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No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THOMAS J. LIPTON, INC., and KRAFT, INC.,
Petitioners,

v.

R.C. BIGELOW, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986), this Court held that a competitor does not have standing to seek injunctive relief against a proposed acquisition under section 16 of the Clayton Act unless the competitor proves a likelihood of antitrust injury, that is, a likelihood of injury from predatory or other anticompetitive misconduct that will result from the proposed acquisition. If the competitor does not prove such an antitrust injury, the case is over and the court need not consider the legality of the proposed merger under the Clayton Act.

Consistent with this Court's decision in *Cargill*, can section 16 antitrust injury to a competitor be presumed solely from the post-acquisition market share of the acquiring company?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, were R.C. Bigelow, Inc. ("Bigelow"), appellant, and Thomas J. Lipton, Inc. ("Lipton"), Celestial Seasonings, Inc. ("Celestial"), and Kraft, Inc. ("Kraft"), appellees.

LISTING REQUIRED BY RULE 28.1

Lipton is a wholly owned subsidiary of Unilever United States, Inc. ("UNUS"). UNUS is a subsidiary of Unilever N.V., a Netherlands corporation, and Unilever PLC, a United Kingdom corporation. Unilever N.V. has a Board of Directors identical to, and a dividend equalization agreement with, Unilever PLC. All of Lipton's subsidiaries are wholly owned. Lipton has no other affiliates.

Kraft is a wholly owned subsidiary of Kraft General Foods, Inc., which is a wholly owned subsidiary of Philip Morris Companies Inc. Excluding wholly owned subsidiaries, Kraft's subsidiaries are Butland Industries Limited, Roskill Cartage and Storage Limited, Lakeland Dairies Pty. Ltd., Lotte Kraft Incorporated Company and Commerciale Osella S.p.A. Kraft is also indirectly affiliated with its parent companies' subsidiaries and affiliates, all of which are directly or indirectly owned by Philip Morris Companies Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 867 F.2d 102 (1989), and is reproduced in Appendix A, pp. 1a-19a, below. The opinion of the United States District Court for the District of Connecticut is reported at 689 F. Supp. 76 (1988), and is reproduced in Appendix B, pp. 20a-31a, below.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 17, 1989, reversing a June 15, 1988, order of the United States

District Court for the District of Connecticut. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied by the Court of Appeals in a March 8, 1989, order, which is reproduced in Appendix C, pp. 32a-33a, below, and the mandate of the Court of Appeals has now issued. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT OF THE CASE

1. Introduction

The Court should grant certiorari and decide this case in order to ensure compliance by the lower courts with its ruling in *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986), and in order to resolve a conflict among the circuits.

Less than three years ago, the Court decided in *Cargill* that a competitor does not have standing to seek injunctive relief against a proposed acquisition under section 16 of the Clayton Act unless it first proves likely antitrust injury, that is, likely injury to the complaining competitor from predatory pricing or other antitrust misconduct that will result from the proposed acquisition.

The dissenting Justices in *Cargill* would have presumed section 16 antitrust injury if the complaining competitor demonstrated that the proposed acquisition was reasonably likely to violate section 7 of the Clayton Act by substantially lessening competition or tending to create a monopoly.[1] The *Cargill* majority refused to presume antitrust injury from market share data or any other evidence relevant to the merits of the section 7 challenge; it ruled that the trial court need not reach the merits, nor assess market share data or other evidence relevant to the

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[1] Section 7 of the Clayton Act, 15 U.S.C. § 18, reads in relevant part as follows:

> "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

merits, unless the complaining competitor first demonstrates likely antitrust injury from predatory pricing or other antitrust misconduct made possible as a result of the proposed acquisition.

The Second Circuit's decision below is consistent with the dissent in *Cargill* but flatly contrary to the opinion of the Court. The Second Circuit presumed antitrust injury to a complaining competitor from the acquiring company's post-merger market share of approximately eighty percent of an alleged herbal tea market.

The Second Circuit's decision also conflicts with the decision of the Fifth Circuit in *Phototron Corp.* v. *Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988). In *Phototron*, the Fifth Circuit held that market share data cannot substitute for direct proof of section 16 antitrust injury. The Second Circuit expressly disagreed with the Fifth Circuit in *Phototron*, *see* 867 F.2d at 109, p. 15a, below, and presumed section 16 antitrust injury solely from market share data.

2. Statement of Facts

In this case, respondent Bigelow challenged petitioner Lipton's proposed acquisition of Celestial. Lipton is a manufacturer and marketer of a full line of teas, beverages, and food products, and is the second largest U.S. manufacturer of herbal tea. Celestial, which until recently was a wholly owned subsidiary of petitioner Kraft, is the country's largest seller of herbal teas. Respondent Bigelow is the third largest supplier of herbal teas in the United States.[2]

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[2] Herbal "teas" are actually not teas. Rather, they are blends of common varieties of flowers, leaves, roots and stems of edible plants, *e.g.*, camomile, rose hips, hibiscus flowers, blackberry leaves, orange peel, spearmint leaves, licorice roots and numerous others. These herbal blends are steeped in water, yielding a natural beverage, which is served either hot or cold.

On December 5, 1987, Kraft agreed to sell Celestial to Lipton. Shortly thereafter, Lipton and Kraft made the requisite premerger filings with the Department of Justice and the Federal Trade Commission ("FTC"), the government agencies charged with reviewing such transactions under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. The FTC then commenced a six-month investigation of the acquisition, collecting more than 350,000 pages of documents, deposing executives of Lipton, Kraft and Celestial and interviewing numerous industry representatives, including executives of respondent Bigelow. Upon completion of its investigation, the FTC elected not to challenge the acquisition.

3. Proceedings Below

Respondent Bigelow was a vocal complainant throughout the FTC investigation, and presented to the FTC the same arguments that it makes in this litigation. When the FTC failed to take action against the transaction, Bigelow commenced this litigation on May 26, 1988, seeking to enjoin the acquisition as a violation of section 7 of the Clayton Act, 15 U.S.C. § 18. Bigelow claimed that the acquisition would confer market power on Lipton and thereby allow Lipton to harm Bigelow. According to Bigelow, the proposed acquisition would enable Lipton to deny Bigelow access to shelf space in supermarkets, deny it access to processed herbs, and prevent Bigelow from having loyal distributors for its products.

On May 31, 1988, the District Court held a hearing on Bigelow's application for a Temporary Restraining Order ("TRO"). Lipton and Kraft opposed the TRO with a motion to dismiss for lack of antitrust standing. At the TRO hearing, Lipton and Kraft consented to a stay of the merger pending disposition of their motion to dismiss. At the suggestion of the District Court, defendants' motion to dismiss was converted into a motion for summary judgment, and the parties agreed to an expedited discovery schedule.

On June 15, 1988, after the parties had completed their discovery and presented all the evidence they sought to present, the District Court granted defendants' motion for summary judgment. It held that, under the standards laid down by this Court in *Cargill*, Bigelow had failed to raise a genuine issue of material fact with respect to whether it was threatened with antitrust injury as a result of the proposed merger. In reaching its decision, the District Court analyzed and rejected Bigelow's argument that antitrust injury could be presumed from post-merger market share.[3] Antitrust standing under *Cargill*, according to the District Court, requires more than market share. 689 F. Supp. at 79, p. 24a, below. The District Court concluded that while a post-acquisition share of eighty percent was sufficient for a *prima facie* showing of "monopoly power," a competitor must show more than that it is competing with a monopolist in order to have standing under *Cargill*. *Id.*

The District Court acknowledged that a showing of monopoly power might be sufficient to demonstrate antitrust injury if it were also demonstrated that Lipton had acted with predatory intent in acquiring Celestial, but the court found no credible evidence of such predatory intent in this case. 689 F. Supp. at 79-80, pp. 24a-26a, below. Bigelow had advanced three theories of predatory intent: (1) that predatory intent could be inferred from Lipton's willingness to pay a "premium" for Celestial; (2) that Lipton's apparent efforts to acquire Bigelow shortly after the Celestial acquisition was announced demonstrated predatory intent; and (3) that certain Lipton documents—none of which were specific to the acquisition—showed Lipton's intent to "eliminate competition." The District Court found there to be no factual basis for any of these allegations. *Id.*

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[3] For purposes of the summary judgment motion, Lipton and Kraft had stipulated that the relevant market was herbal tea and that Lipton would have at least eighty percent of that market after the acquisition. 689 F. Supp. at 79 n.3, p. 24a n.3, below.

Next, the District Court noted that Bigelow might also establish antitrust standing if it presented evidence of a substantial likelihood of predatory activity by Lipton after the acquisition. Here again, the court concluded that there was no issue of material fact with regard to Bigelow's specific allegations of likely or possible predatory acts. In particular, the court concluded that there were no factual issues with respect to whether, after the acquisition, Lipton would be likely to: (1) engage in predatory pricing; (2) deny Bigelow access to shelf space; (3) exercise improper pressure over Bigelow's distributors; or (4) foreclose Bigelow from access to herb supplies. 689 F. Supp. at 80-82, pp. 26a-30a, below.

On appeal to the United States Court of Appeals for the Second Circuit, Bigelow claimed that the District Court had erred in granting defendants' summary judgment motion. Bigelow repeated the same claims concerning Lipton's likely or possible predatory acts it had presented below. In addition, Bigelow argued that as a matter of law, a competitor's standing to challenge an acquisition should be presumed when the merging firms would have a market share in excess of eighty percent.

The Court of Appeals reversed the District Court's order granting summary judgment and held that "[m]arket share data—assuming that it is accurate and indicative of substantial market power to eliminate competition—constitutes sufficient evidence, in and of itself, of antitrust injury to a competitor to create a genuine issue for trial." 867 F.2d at 111, p. 18a, below. The Court of Appeals did not question the District Court's finding that there was no genuine evidence of predation or other antitrust misconduct likely to injure Bigelow. Instead, the court focused exclusively on the post-merger market share of the acquiring firm and found an issue of fact regarding the likelihood of antitrust harm implicit in that share. The Court of Appeals presumed section 16 antitrust injury solely on the basis of market share.

The Court of Appeals expressly rejected the Fifth Circuit's interpretation of *Cargill* in *Phototron Corp.* v. *Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988), a similar merger case. The Second Circuit pointedly declined to follow *Phototron* to the extent that it requires "*proof* of antitrust injury on an application for a preliminary injunction." 867 F.2d at 109, p. 15a, below (emphasis in original). The Court of Appeals expressly stated that while a high market share is not a "*per se* violation of section 7 of the Clayton Act," 867 F.2d at 110, p. 17a, below, such market share data are sufficient evidence to create a genuine issue of fact as to antitrust injury. The court thus held that Bigelow had shown a "substantial likelihood of sustaining 'antitrust injury.'" 867 F.2d at 111, p. 19a, below.

The case was then remanded to the District Court for further proceedings. Petitioners requested rehearing with suggestion for rehearing *en banc*; that petition was denied on March 8, 1989.

REASONS FOR GRANTING THE WRIT

The question of when competitors should be allowed to invoke the antitrust laws has concerned this Court and antitrust commentators for several decades.[4] As this Court has recognized, competitors generally have a strong incentive to bring antitrust suits in precisely the wrong cases. When another firm becomes more efficient or profitable, competitors of that firm may seek to invoke the antitrust laws against the firm, even though the threat to competitors patently will not constitute the sort of injury the antitrust laws were meant to prevent. By contrast, if the other firm takes action that seems likely

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[4] *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962); *see also* Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985).

to enable competitors to restrict output and raise prices, competitors will stand to benefit and have little incentive to challenge the action.

To prevent the antitrust laws from becoming a breakwater against the rigors of legitimate competition, this Court has ruled that, in order to have standing to seek relief under the antitrust laws, plaintiffs must establish antitrust injury—that is, loss or damage "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[5] This doctrinal limitation establishes a threshold that antitrust plaintiffs must pass before they have standing to bring suit under the antitrust laws.

Just three years ago, in *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986), the Court held that this antitrust injury requirement applies in suits brought by competitors to enjoin mergers under section 16 of the Clayton Act, 15 U.S.C. § 26. In that case, the lower courts had permitted an injunction to issue under section 16 on the ground that increased competition caused by the merger would have harmed the plaintiff. The Court reversed, holding that a section 16 plaintiff "must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury." 479 U.S. at 122.

The Court in *Cargill* also addressed the question of precisely how a competitor could demonstrate antitrust injury in the context of a proposed merger. The *Cargill* dissent suggested that the requirement should be satisfied "if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete." 479 U.S. at 123 (Stevens, J., dissenting). The majority, however, rejected this approach. As the dissent explained,

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[5] *Brunswick*, 429 U.S. at 489.

> "[T]he Court in practical effect concludes that a private party may not obtain injunctive relief against a horizontal merger unless the actual or probable conduct of the merged firms would establish a violation of the Sherman Act. . . . *By emphasizing post-merger conduct, the Court reduces to virtual irrelevance the related but distinct issue of the legality of the merger itself.*"

Id. at 123 n.1 (emphasis added). In other words, the *Cargill* majority concluded that a section 16 plaintiff can establish antitrust injury only if the plaintiff demonstrates that the proposed merger threatens to cause the plaintiff "an injury of the type the antitrust laws were designed to prevent." 479 U.S. at 111. The fact that the merger itself might violate section 7 of the Clayton Act was, in the dissent's words, "irrelevant" to the issue of antitrust injury.

Cargill's application of an antitrust injury requirement to merger cases was entirely appropriate. Mergers and acquisitions play a critical role in disciplining corporate managers and eliminating inefficiencies. When a proposed merger or acquisition appears most likely to fulfill these salutary functions, less efficient competitors are prone to protect the status quo by invoking section 16. As Professor Areeda has noted, section 16 suits offer a particularly potent device for the discomfited competitor because a "preliminary injunction may be obtained fairly easily . . . and delay may effectively kill a transaction where the parties' financial agreement depends critically on current market conditions, or where they find the delay, uncertainty, or expense of litigation unduly burdensome." [6] The Court's *Cargill* decision ensures that competitors cannot misuse section 16's equitable remedies to disrupt mergers that present no credible threat of anticompetitive harm.

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[6] P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 334.2b (Supp. 1988).

Cargill's imposition of an antitrust injury requirement in the context of section 16 was also sensible because the risks of underenforcement of the antitrust laws in this context are so slight. Under the Hart-Scott-Rodino Act, all major mergers and acquisitions are reviewed by the federal government, as was the Lipton-Celestial transaction. Section 16 plaintiffs serve only to backstop the federal agencies with primary enforcement authority. Because the temptation for misuse in this context is so great, the *Cargill* antitrust injury requirement for competitor actions under section 16 is sound public policy.

The costs of imposing this requirement are not high. Competitors that cannot establish antitrust injury in section 16 suits are not permanently precluded from obtaining relief under the antitrust laws. If, after a merger or acquisition is consummated, the resulting firm does indeed violate the antitrust laws—whether through predatory pricing or some other form of anticompetitive misconduct—injured competitors can seek treble damages and other appropriate remedies under section 4 of the Clayton Act. *Cargill* merely stands for the proposition that competitors cannot obtain prospective relief under the antitrust laws unless they can establish in advance that the merger or acquisition will cause them antitrust injury.

1. The Second Circuit's approach to antitrust injury in this case is wholly inconsistent with the *Cargill* decision. Here, respondent had alleged predatory intent and a host of post-merger anticompetitive practices that, if proven, would have satisfied the *Cargill* antitrust injury requirement. The District Court, however, rejected each of these allegations on the grounds that Bigelow had failed to produce evidence supporting any of its claims.[7]

[7] In particular, the District Court found plaintiff had "failed to raise a genuine issue of material fact regarding Lipton's intent in acquiring Celestial," 689 F. Supp. at 80, p. 26a, below; "failed to submit any evidence whatsoever in support of" its allegation of

Absent any evidence of injury of the sort that the antitrust laws were intended to prohibit, the District Court ruled, plaintiff Bigelow lacked standing to challenge the proposed merger.

The Court of Appeals did not dispute the District Court's finding that respondent had failed to prove any of its allegations of predatory practices; nevertheless it ruled that plaintiff had demonstrated antitrust injury because defendants' post-acquisition market share of more than eighty percent creates "*prima facie* evidence of monopoly power" and therefore "raises a presumption of illegality and of antitrust injury to competitors of the alleged monopolist." 867 F.2d at 108, pp. 12a-13a. below. The Court held that "unless defendants meet their burden of rebutting this presumption, the merger must be enjoined." *Id.*

The Second Circuit's presumption of antitrust injury eviscerates this Court's ruling in *Cargill*. The central holding of *Cargill* (and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 519 (1983)) is that competitors must establish a likelihood of specific antitrust injury in order to gain standing to enforce the antitrust laws. Contrary to section 16 and *Cargill*, the Second Circuit waives this requirement by permitting plaintiffs to presume such an injury merely by alleging a high post-merger "market" share.[8]

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predatory pricing, 689 F. Supp. at 80, p. 27a, below; had failed to produce evidence that defendants had intended to use promotional schemes in an illegal manner or to deny Bigelow access to shelf space, 689 F. Supp. at 81, p. 29a, below; had "submitted no evidence that Lipton will attempt to interfere improperly with Bigelow's distributors," *id.*; and "lack[ed] factual support in the record" for its allegations that Lipton would exercise improper control over the raw herb market," 689 F. Supp. at 82, p. 30a, below.

[8] The Second Circuit's presumption is also inconsistent with this Court's recent efforts to limit the use of inferences and presumptions in the antitrust field. *See, e.g., Matsushita Elec. Indus.* v. *Zenith Radio Corp.*, 475 U.S. 574, 595-98 (1986); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984).

Indeed, the antitrust injury presumption accepted by the Second Circuit is virtually identical to the approach that a minority of this Court unsuccessfully advanced in *Cargill*. As the *Cargill* dissent itself acknowledged, the *Cargill* majority ruled that, to stay in court, a competitor would have to establish something more than that a proposed merger appeared likely to affect competition. Here, the Second Circuit has simply presumed the "something more" from the probable impact of the merger.

The Second Circuit's decision opens up the possibility of precisely the sort of manipulation of the antitrust laws that *Cargill* was intended to foreclose.[9] Under the interpretation of section 16 adopted by the Court of Appeals, a competitor may seek to enjoin any merger that results in a high market share in any alleged "market," perhaps a "market" specially crafted for the proceeding. At the critical TRO and preliminary injunction stages of litigation, defendants would be forced to rebut a presumption of antitrust injury. In the meantime, many economically desirable acquisitions may be delayed or terminated.[10]

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[9] *Cf. Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F. Supp. 1250, 1272-74 (E.D. Pa. 1987) (finding antitrust injury only after ascertaining that there was direct evidence of predatory intent on the part of the defendants).

[10] The Second Circuit also failed to consider whether it was sensible to presume that a merged company with a high market share would engage in the sort of predatory pricing that might give rise to antitrust injury. As a matter of simple economics, predatory pricing—that is, pricing below cost—is rational corporate behavior only if the pricer can recoup its losses through subsequent supra-competitive pricing. The greater the pricer's market share, however, the larger its predatory pricing losses will be and the more difficult it will be for the pricer to recoup its losses in the future.

Moreover, when a company competes in a market where there are no barriers to entry, supra-competitive pricing is not possible because the new entrants quickly return prices to competitive

The Second Circuit wholly failed to consider the sound policies underlying this Court's decision in *Cargill* and the unfortunate implications of opening the doors to section 16 suits when there is no direct evidence of antitrust injury. The Second Circuit's ruling is flatly inconsistent with *Cargill* and therefore cannot be allowed to stand.[11]

2. The Second Circuit's ruling has also precipitated a direct conflict with the Fifth Circuit's decision in *Phototron Corp.* v. *Eastman Kodak Co.*[12] In that case, Photo-

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levels. *See Matsushita Elec. Indus.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). Here Bigelow's president testified in a deposition that he expected no predatory pricing post-merger. There was also uncontroverted economic evidence that barriers to entry in herbal tea are nonexistent. 689 F. Supp. at 81 n.5, p. 29a n.5, below. Any attempt by Lipton to charge supra-competitive prices post-merger would thus quickly bring into the market new or returning competitors, promptly driving prices down to competitive levels.

[11] This case is not the only instance in which the Second Circuit has failed to follow this Court's ruling in *Cargill*. In *Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989), a divided panel from that Circuit just three months ago ruled that a target corporation could invoke section 16 to enjoin a hostile tender offer. As the dissenting member of the panel noted, the majority's holding was in direct conflict with other post-*Cargill* decisions in this area: All other federal courts to rule on this issue have concluded that, after *Cargill*, targets lack standing to seek relief under section 16. *Id.*, slip op. at 3-4 (Altimari, J., concurring in part and dissenting in part); *see Burnup & Sims, Inc.* v. *Posner*, 688 F. Supp. 1532, 1534-35 (S.D. Fla. 1988); *Burlington Indus* v. *Edelman*, 666 F. Supp. 799, 803-06 (M.D.N.C. 1987). The Second Circuit's *Consolidated Gold Fields* decision is also in conflict with the weight of scholarly commentary. *See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 340.2i, at 369 (Supp. 1988) ("It is difficult to see how a tender offer target can suffer antitrust injury."); Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155 (1982). The *Consolidated Gold Fields* decision, like the decision of the Court of Appeals in this case, reveals that the Second Circuit has broken with the Supreme Court and the rest of the federal judiciary in its interpretation of section 16.

[12] 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988).

tron sought to enjoin under section 16 the merger of Kodak and Colorcraft, its two largest competitors in the wholesale film processing industry. The post-merger market share of Kodak-Colorcraft was projected to be between 66 and 85 percent,[13] roughly equivalent to the Lipton-Celestial share of the herbal tea market after the merger at issue in this case. The plaintiff in *Phototron* claimed that it had satisfied the *Cargill* requirement for antitrust injury because "the competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." 842 F.2d at 100.

The Fifth Circuit rejected this argument, explaining that "[i]n *Cargill*, the Court required that the plaintiff not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury." *Id.* The court specifically dismissed Phototron's contention that "the merits of the Kodak-Colorcraft merger are an important consideration in determining standing." *Id.* The court concluded, "[T]he notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law." *Id.*[14]

The Second Circuit in this case was candid in admitting its disagreement with the Fifth Circuit's *Phototron* decision: "To the extent that *Phototron* requires *proof* of antitrust injury on an application for a preliminary injunction, we decline to follow its reasoning." 867 F.2d at 109, p. 15a, below. As a result of this split, plaintiffs in the Second Circuit now have standing to enjoin under section 16 any merger of competitors that creates a sub-

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[13] 687 F. Supp. 1061, 1065 (N.D. Tex. 1988).

[14] The Fifth Circuit's decision in *Phototron* was in accord with a number of other Circuits that have declined to presume antitrust injury to competitors from substantive violations of the antitrust laws. *See, e.g., Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989); *Alberta Gas Chemicals, Ltd.* v. *E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1241-43 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 2830 (1988).

stantial market share. In the Fifth Circuit and elsewhere around the country,[15] plaintiffs are not entitled to this presumption of antitrust injury and must present actual proof of predatory or other illegal activities in order to have standing to seek injunctive relief.

As this Court has recognized in other contexts, mergers and acquisitions play an essential role in our national economy. Laws affecting these transactions, such as section 16 of the Clayton Act, must be applied throughout the country in a uniform manner. The split between the Second and Fifth Circuits in this case has created a major difference in the regulation of mergers, and this Court should promptly resolve this difference by deciding which Circuit has adopted the appropriate test.

3. While the proposed merger of Lipton and Celestial was stayed pending appeal to the Second Circuit, Kraft chose to cancel the transaction and to dispose of its ownership interest in Celestial through a management-led buyout.[16] Prior to issuing its decision in this case, the Second Circuit was advised that the proposed acquisition was no longer pending. At the time Lipton and Kraft argued to the Second Circuit that this intervening event had rendered the case moot. The Second Circuit rejected this argument on the grounds that the event constituted "voluntary cessation" on the part of defendants and that the court was not satisfied "that the in-house buyout of Celestial is the sort of arms-length transfer that removes the alleged threat of combination facing Bigelow." 867 F.2d at 106, p. 9a, below; *see Gwaltney*

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[15] *See, e.g., Treasurer, Inc.* v. *Philadelphia Nat'l Bank*, 682 F. Supp. 269 (D.N.J.), *aff'd mem.*, 853 F.2d 921 (3d Cir. 1988); *Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987).

[16] On September 12, 1988, Kraft signed an asset purchase agreement with C.S. Herb Holdings, Inc., a corporation formed to assume ownership of Celestial on behalf of the Celestial management, and the transfer was consummated on November 1, 1988.

of Smithfield v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953). Because "[n]owhere in the record . . . ha[d] Lipton disavowed any future intention to acquire Celestial," the Court of Appeals reasoned that the case remained justiciable. 867 F.2d at 106, p. 9a, below.[17]

In this petition, Lipton and Kraft do not challenge the Second Circuit's ruling on the mootness issue and limit their request for review to the ruling of the Court of Appeals on the merits.[18] If, however, the Court concludes that the case has become moot, petitioners respectfully request that the Second Circuit's decision be vacated and the District Court's order granting petitioners' motion for summary judgment be reinstated.

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[17] Following remand from the Second Circuit, the District Court has permitted Bigelow to take discovery solely limited to the mootness issue.

[18] The issuance of the Second Circuit's decision has, in fact, enhanced the justiciability of the case. In light of the Second Circuit's ruling, Bigelow has stated that it will be claiming injunctive relief and "the costs and attorneys' fees to which it is entitled as the party that has 'substantially prevailed.'" Bigelow May 1, 1989, Status Report, at 1, 4. As the Supreme Court noted in *Local No. 82* v. *Crowley*, 467 U.S. 526, 536 n.11 (1984), collateral matters, such as pending claims for attorneys' fees, preserve the justiciability of cases on review in the Supreme Court. *See also Powell* v. *McCormack*, 395 U.S. 486 (1969) (collateral claim for monetary damages will preserve justiciability of appeal from denial of injunctive relief that is no longer needed); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) (habeas corpus petition challenging incarceration remains justiciable even after petitioner is released because of collateral consequences of a criminal conviction). *But see Friends of Keeseville, Inc.* v. *FERC*, 859 F.2d 230, 233 n.7 (D.C. Cir. 1988) ("A request for attorneys' fees does not preserve a case which is otherwise moot.").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the Court should resolve the split among the circuits on this issue. In the alternative, because the decision of the Court of Appeals is so clearly inconsistent with this Court's prior decisions, the petition should be granted, the decision below should be summarily vacated, and the case should be remanded for disposition consistent with this Court's ruling in *Cargill*.

Respectfully submitted,

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June 5, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1517—August Term, 1987

(Argued: July 21, 1988 Decided: January 17, 1989)

Docket No. 88-7505

R.C. BIGELOW, INC.,
Plaintiff-Appellant,

v.

UNILEVER N.V., THOMAS J. LIPTON, INC.,
CELESTIAL SEASONINGS, INC., and KRAFT, INC.,
Defendants-Appellees.

Before:

LUMBARD and ALTIMARI, *Circuit Judges*, and DEARIE, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Connecticut (Jose A. Cabranes, *Judge*), granting defendants-appellees' motion for summary judgment on plaintiff-appellant's challenge to a proposed merger under section 7 of the Clayton Act, and

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* The Honorable Raymond J. Dearie, United States District Court for the Eastern District of New York, sitting by designation.

thereby dismissing plaintiff-appellant's claim for preliminary injunctive relief under section 16 of the Clayton Act.

Reversed and remanded.

PAUL WINDELS, JR., New York, New York (Anthony A. Dean, Clayton A. Prugh, Windels, Marx, Davies & Ives, New York, New York, Colin E. Gunn, Westport, Connecticut, of counsel), for *Plaintiff-Appellant.*

RICHARD J. WERTHEIMER, Washington, D.C. (Kenneth V. Handal, Arnold & Porter, Washington, D.C., Tefft W. Smith, Daniel F. Attridge, Kirkland & Ellis, Chicago, Illinois, of counsel), for *Defendants-Appellees.*

ALTIMARI, *Circuit Judge*:

Plaintiff-appellant R.C. Bigelow, Inc. appeals from a judgment of the United States District Court for the District of Connecticut (Cabranes, *J.*), 689 F. Supp. 76 (1988), granting defendants-appellees' motion for summary judgment for failure to raise a genuine issue of material fact sufficient to establish standing to challenge proposed merger under sections 7 and 16 of the Clayton Act, 15 U.S.C. § 18, 26. The question presented in the district court and on this appeal is whether, in order to survive a motion for summary judgment, plaintiff demonstrated a sufficient factual basis indicating a substantial likelihood that the proposed merger of defendant-appellee Celestial Seasonings, Inc. by defendant-appellee Thomas J. Lipton, Inc. would threaten plaintiff with "antitrust injury" as required by *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Because we find that there is a genuine issue of material

fact regarding the threat of "antitrust injury" to plaintiff, we reverse.

BACKGROUND

On December 8, 1987, Thomas J. Lipton, Inc. ("Lipton"), a wholly-owned subsidiary of Unilever N.V., announced that it had agreed to purchase Celestial Seasonings, Inc. ("Celestial") from Kraft, Inc. In 1984, Celestial was sold by its founder to Kraft, a diversified consumer food products company. Celestial is the largest United States producer, with approximately 52% of the market, of "herbal teas," a special blend of caffeine-free ingredients. These "teas" actually are not derived from the "tea plant," which is the source of what is better known simply as "tea," or "black tea," but contain such herbs and natural ingredients as peppermint, spearmint, hibiscus flowers, camomile, orange peel, lemon rind, blackberry leaves, licorice roots, rosehips, and lemon verbena. Although herbal teas are ancient in origin, they have only within the last decade or so become widely available in supermarkets and grocery stores across the country to those who desire caffeine-free hot beverages. Herbal teas account for some $90 million in annual sales and represent over 90% of Celestial's current sales.

Lipton is a competitor of Celestial in the national market for herbal teas. It controls the second largest herbal tea market share at 32% while at the same time being the largest seller of black tea in the United States. In the early 1980s, Lipton entered the herbal tea market and for a brief time was the market leader; but since 1985 its market share has been dwindling. Lipton's parent, Unilever N.V., a Netherlands corporation, is one of the world's largest distributors of grocery products with worldwide sales in excess of $30 billion and, as a result, has gained substantial access to the all-important shelf space of supermarkets across the country.

The third largest producer of herbal teas is plaintiff-appellant R.C. Bigelow, Inc. ("Bigelow"). Bigelow is a family-owned corporation founded in 1945 by Ruth C. Bigelow in her kitchen in Manhattan. Today her son, company president and chief executive officer David C. Bigelow, his wife and their two daughters run the family business employing about 260 people from the company's headquarters in Norwalk, Connecticut. The company started out by making flavored black teas such as "Constant Comment," a tea blend with orange peel and spices. Then in 1979, Bigelow entered the herbal tea market and now has garnered a market share of 13%, accounting for approximately one-third of the company's sales. With an initial investment of under $100,000, Bigelow's herbal tea sales have increased to about $10 million annually.

Within a week following Lipton's announcement that it planned to acquire Celestial, Lipton allegedly approached Bigelow expressing an interest in negotiating the purchase of plaintiff, the only remaining competitor in the herbal tea market with a significant market share. Bigelow did not respond to Lipton's offer. Meanwhile, in accordance with the premerger notification requirements of 15 U.S.C. § 18a, Lipton informed the Department of Justice and the Federal Trade Commission ("FTC") of the proposed merger involving Celestial. The FTC conducted a full review of the transaction over a period of six months, and Bigelow by all accounts was an active complainant in objecting to consummation of the impending deal.

When it became clear to Bigelow that the FTC would take no action challenging the acquisition, Bigelow filed an action in the district court seeking, *inter alia*, a temporary restraining order and preliminary injunction under section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent the proposed merger from going forward. On May 31, 1988, the district court temporarily enjoined the merger

pending a hearing on defendants' motion for summary judgment set for June 10, 1988. At that hearing, defendants informed the court that the FTC apparently had decided against challenging the merger since it let the final time extension of the statutorily required waiting period lapse without taking any enforcement action. *See* 15 U.S.C. § 18a(e). The parties also represented that discovery had been completed and that, if necessary, they were ready to proceed with a trial on the merits for permanent injunctive relief.

In considering Bigelow's claim that the proposed combination of the country's two largest producers of herbal tea would substantially lessen competition and tend to create a monopoly, the district court was asked to decide as a matter of law whether a competitor, who faces the prospect of competing against an alleged monopolist controlling 84% of the relevant market, has sufficiently demonstrated a threat of "antitrust injury" to establish standing under section 16 of the Clayton Act. *See Cargill*, 479 U.S. at 113; *Brunswick*, 429 U.S. at 489. The district court held that Bigelow failed to raise a genuine issue of material fact with respect to whether it was threatened with antitrust injury. While the court indicated that a post-acquisition market share of 84% was "more than sufficient to establish a *prima facie* showing of 'monopoly power,'" 689 F. Supp. at 79; *see United States v. Waste Management, Inc.*, 743 F.2d 976, 981 (2d Cir. 1984), it concluded that "the mere fact that Lipton will possess monopoly power after the proposed acquisition is not a sufficient showing that Lipton will exercise that power in a way that will cause injury to Bigelow." 689 F. Supp. at 79; *see Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) ("mere possession of monopoly power does not *ipso facto* condemn a market participant"), *cert. denied*, 444 U.S. 1093 (1980). Relying on the Fifth Circuit's observation in *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95

(5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988), that the Supreme Court's decision in *Cargill* "has imposed significant barriers to competitor attempts to enjoin merger transactions," *id.* at 102, the district court found plaintiff's allegations of the threat of injury resulting from anticompetitive or predatory activity to be merely speculative. In the court's judgment, absent some evidence of past instances of predatory pricing or present intent to engage in predatory behavior following the merger, plaintiff's claim for injunctive relief under section 16 of the Clayton Act must fail. Accordingly, the district court granted defendants' motion for summary judgment.

Following the entry of judgment in favor of defendants, plaintiff immediately filed a notice of appeal and requested a stay pending appeal from the district court. The court denied the stay pending appeal but preserved the status quo until this court could rule on Bigelow's motion for a stay. On June 21, 1988, this court heard argument on plaintiff's motion and ordered from the bench that a stay be granted during the pendency of this appeal. We heard oral argument on the merits of Bigelow's appeal on July 21, 1988.

Subsequent to oral argument, on September 12, 1988, the court was informed by counsel for defendants that Kraft had elected to cancel the proposed sale to Lipton of Celestial pursuant to the terms of a purchase agreement between Kraft and Lipton. Defendants thereupon moved to dismiss the appeal as moot since "[t]he transaction at issue—the acquisition by Lipton of Celestial Seasonings from Kraft—has been abandoned by Kraft [who] has sold Celestial Seasonings to another group not presently in the tea or herb[al] tea business." The moving papers indicated that on September 12, 1988, Kraft entered into an agreement with an investment unit of Vestar Capital Partners, Inc. ("Vestar"), a firm specializing in leveraged buyouts, for a management-led buyout of Celestial.

On October 3, 1988, after consideration of the motion to dismiss the appeal and supporting and opposition papers filed together therewith, we granted the motion subject to agreement by the parties to reasonable conditions terminating the appeal. After the parties were unable to agree to reasonable conditions, we denied defendants' motion to dismiss the appeal as moot on November 1, 1988. At that time, we indicated that in our judgment the case was not moot given the uncertainty of cessation of the alleged anticompetitive activity against Bigelow. Thereafter, defendants moved for reconsideration of the denial of their previous motion to dismiss the appeal on the ground that the management-led buyout of Celestial closed on November 1, 1988. On November 22, 1988, we denied the motion for reconsideration.

DISCUSSION

I. *Mootness.*

A basic tenet of federal jurisdiction is that when a court is presented with issues that "are no longer 'live'" or when the parties "lack a cognizable interest in the outcome," the case is moot and therefore outside the court's jurisdictional authority. *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *accord Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam); *see* U.S. Const. Art. III, § 2 (limiting judicial power to actual cases and controversies). The case must be "live" at every stage of the proceeding, including the appeal. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950). A recognized exception to the general rule of mootness is in cases that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The "capable of repetition, yet evading review" doctrine, as applied in cases other than class actions, is limited, however, to situations in which there is a "reasonable expectation" or "demonstrated probability" that the same controversy will recur involving the same complaining party.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam); *accord Murphy*, 455 U.S. at 482; *Jefferson v. Abrams*, 747 F.2d 94, 96-97 (2d Cir. 1984). Nevertheless, it is also well settled that "voluntary cessation of allegedly illegal conduct . . . does not make [a] case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). In such circumstances, there may very well remain a controversy to be settled since a defendant "is free to return to his old ways." *Id.* While the case may still be moot if the defendant can demonstrate that there is no "reasonable expectation" the same controversy will recur, *id.* at 633; *see United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (1945) (L. Hand, *J.*), the defendant's burden in this regard "is a heavy one." 345 U.S. at 633.

In the instant case, defendants contend that the Lipton/Celestial transaction has been abandoned, and they represent that Lipton is not contemplating any new effort to acquire Celestial. Kraft maintains that neither Lipton nor Unilever invested in or participated in any way in the management-led buyout of Celestial. Bigelow responds by arguing that the claimed abandonment of the Celestial acquisition was a unilateral action taken for the deliberate purpose of evading a possible adverse decision by this court. According to Bigelow, there is a "reasonable expectation" that the alleged violations of the antitrust laws will recur and in no sense has the Lipton/Celestial transaction been irrevocably abandoned. In view of the fact that defendants have not disclosed who the ultimate real parties in interest to the "new" Celestial might be and the fact that the apparent discontinuance of the challenged activity is the result of the intervention of a third party, *i.e.*, Vestar, plaintiff takes the position that there is more than a "mere" or "abstract" possibility that Lipton will again seek to acquire Celestial. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75 (1978); *Weinstein*, 423 U.S. at 149; *W.T. Grant Co.*, 345 U.S. at 633; *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 27 (2d Cir. 1983). We agree.

Defendants have not satisfied us that the in-house buy-out of Celestial is the sort of arms-length transfer that removes the alleged threat of combination facing Bigelow. While defendants assert that Bigelow's fears of a revival of the Lipton/Celestial transaction is "wholly hypothetical" and that neither Celestial nor Lipton is presently contemplating any such transaction, we note that a disclaimer of intention to revive allegedly unlawful conduct does not suffice by itself to meet defendants' heavy burden in order to render the case moot. *See W.T. Grant Co.*, 345 U.S. at 633. Lipton states only that it has not "[made] any investment in or . . . participate[d] in any other way in the management-led buy-out of Celestial Seasonings." Nowhere in the record, however, has Lipton disavowed any future intention to acquire Celestial. Moreover, the Supreme Court recently has emphasized that a defendant's heavy burden is not met unless it is " '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 108 S. Ct. 376, 386 (1987) (quoting *United States v. Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)) (emphasis in *Gwaltney*). When abandonment of challenged conduct seems timed to head off an adverse determination on the merits—particularly when supported by narrowly drawn affidavits containing disclaimers of present intention to resume allegedly unlawful activity—it cannot be said that the possibility of repetition of such activity is merely abstractly conceivable. *See W.T. Grant Co.*, 345 U.S. at 632-33 n.5; *Trane*, 718 F.2d at 27; *see also Upjohn Co. v. American Home Products Corp.*, 598 F. Supp. 550, 555 (S.D.N.Y. 1984) (narrowly drawn affidavits claiming abandonment of allegedly wrongful conduct are insufficient to meet defendant's heavy burden); *McNeilab, Inc. v. American Home Products Corp.*, 501 F. Supp. 517, 523 (S.D.N.Y. 1980) (same); *Fuchs v. Swanton Corp.*, 482 F. Supp. 83, 90 (S.D.N.Y. 1979) (same). Accordingly, because we believe there is more than a "mere possibility" that Celestial may

be acquired by Lipton or Unilever and because of the significant public interest involved in having the legality of practices challenged in this case finally settled, *see W.T. Grant Co.*, 345 U.S. at 632, we conclude that the case is not moot and therefore proceed to a consideration of the question of standing.

II. *Standing.*

The issue to be resolved on this appeal is a narrow one: on a motion for summary judgment, does a competitor have standing under the Clayton Act to enjoin the proposed merger of the two largest producers in the relevant market whose post-acquisition market share is more than sufficient to establish a *prima facie* showing of monopoly power and a presumption of illegality? Defendants maintain that even at this preliminary stage of the proceedings, plaintiff has failed to raise a genuine issue of material fact as to whether it is threatened with "antitrust injury." We disagree.

As the district court correctly recognized, to survive a motion for summary judgment the party opposing the motion must provide a factual basis for its allegations so that when all reasonable inferences therefrom are drawn in its favor, " 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " 689 F. Supp. at 78 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see Murray v. NBC, Inc.*, 844 F.2d 988, 992 (2d Cir.), *cert. denied*, 109 S. Ct. 391 (1988); *Knight v. United States Fire Insurance Co.*, 804 F.2d 9, 11-12 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The threshold issue in an antitrust case brought under section 16 of the Clayton Act is whether the private plaintiff is "threatened [with] loss or damage by a violation of the antitrust laws," 15 U.S.C. § 26, *i.e.*, "threatened loss or damage 'of

the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Simply stated, in this case we therefore must determine whether plaintiff has raised a genuine issue of material fact sufficient to show a threat of antitrust injury as the result of the proposed merger. *See id.; Brunswick*, 429 U.S. at 489; *see also Volvo North America Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988).

Section 7 of the Clayton Act provides in pertinent part that

> No person . . . shall acquire . . . the assets of another person . . . where . . . the effect of such acquisition *may be* substantially to lessen competition, or *to tend to* create a monopoly.

15 U.S.C. § 18 (emphasis added). Under section 16 of the Clayton Act, a private plaintiff is entitled to sue for injunctive relief "against *threatened* loss or damage" to remedy a violation of section 7. *Id.* § 26 (emphasis added).

In evaluating plaintiff's antitrust claims, the starting point is Lipton's post-acquisition market share. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 343 (1962) ("market share . . . is one of the most important factors to be considered when determining the probable effects of the combination on . . . competition in the relevant market"). Whether a proposed merger would substantially lessen competition or tend to create a monopoly is determined through findings, for example, "that the relative size of the acquiring corporation ha[s] increased to such a point that its advantage over competitors threaten[s] to be 'decisive.'" *Id.* at 321 n.36 (quoting H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1950)). Indeed,

> a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so *inherently* likely to lessen competition substantially that it *must* be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963) (emphasis added). While market share data alone does not create an irrebutable presumption of illegality, *see Brown Shoe*, 370 U.S. at 322 n.38 (market share data must be considered "within an industry framework . . . [;] [s]tatistics reflecting the shares of the market controlled by . . . the parties to the merger" must be further examined in light of the "structure, history and probable future" of the particular market); *accord United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974), such a presumption can be overcome only by evidence that the market share data gives an "inaccurate account of the acquisition['s] probable effects on competition." *See United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120 (1975); *United States v. Waste Management, Inc.*, 743 F.2d 976, 982 (2d Cir. 1984). Thus, unless defendants meet their burden of rebutting this presumtion, the merger must be enjoined.

The fact that a competitor of parties to a proposed merger is seeking to remedy the alleged anticompetitive conduct does not significantly alter the analysis. Although we must be wary of competitors attempting to obtain antitrust standing based upon prospective loss or damage due to competition for increased market share, *cf. Cargill*, 479 U.S. at 116 & 122, we have little doubt that antitrust injury to a competitor can be found when the market share of the merging firms threatens to be decisive. Consequently, not only is the post-acquisition market share of 84% in this case *prima facie* evidence of monopoly power as the district court found, 689 F. Supp. at 79, it also raises a presumption of illegality and of antitrust injury

to competitors of the alleged monopolist who are damaged by the " 'type of loss that the claimed violations . . . would be likely to cause.' " *Brunswick*, 429 U.S. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)).

Relying, as did the district court, on the Fifth Circuit's decision in *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988) defendants nevertheless contend that " 'the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is *not* the law.' " Appellees' Brief at 30 (quoting 842 F.2d at 100). *Phototron* involved the proposed merger of the two largest photofinishers in the wholesale photoprocessing market. A competitor of the merging companies challenged the merger, seeking a preliminary injunction barring the impending transaction. The district court determined, solely for the purpose of deciding whether a preliminary injunction should issue, that the resultant market share would range anywhere from 66-85% in the wholesale photofinishing national market and that plaintiff had standing to challenge merger. 687 F. Supp. 1061, 1065-66 & 1069 (N.D. Tex. 1988). After specifically finding that Phototron had shown a substantial likelihood of demonstrating antitrust injury regarding its claim under section 7 of the Clayton Act, *id.* at 1070; *but cf.* 842 F.2d at 98-99 & n.3 (stating that district court failed to consider likelihood of success on standing issue), the district court granted a preliminary injunction. On appeal, the Fifth Circuit reversed on the authority of the Supreme Court's decision in *Cargill*. The *Phototron* court held that the "facially sensible proposition" that a competitor has standing to challenge a merger creating an alleged monopolist has been "undermined by *Cargill*." 842 F.2d at 100. We do not agree that this is necessarily so.

In *Cargill*, the second largest beef packer in the relevant market was attempting to merge with the third

largest competitor in that market. After the proposed merger, the combined market share of the two companies would have been only 20.4%, below the market share of the industry leader whose share was 27.3% and who was not a party to the action. Instead, the fifth-largest beef packer brought an action under section 16 of the Clayton Act to enjoin the prospective merger, and after a *full* trial on the merits, the district court granted permanent injunctive relief. 591 F. Supp. 683 (D. Colo. 1983). The Tenth Circuit subsequently affirmed. 761 F.2d 570 (10th Cir. 1985). In its consideration of plaintiff's claim of antitrust injury, the Supreme Court concluded that the record evidence "[did] not support a finding of antitrust injury, but only of threatened loss from increased competition." 479 U.S. at 122. The Court stated that

> the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that [plaintiff] alleges here, competition for increased market share, is not activity forbidden by the antitrust laws.

Id. at 116. The *Cargill* Court went on to explain that plaintiff had failed to allege anticompetitive conduct harmful both to "competitors *and* competition," *id.* at 118, and that the post-merger market share was insufficient in any event to support an inference of predatory activity following the merger. *Id.* at 119 n.15. Specifically, the Court expressed doubt that a claim of predatory pricing, even had it been advanced by plaintiff, would have been supported by the record given the lack of market power to engage in such a scheme. *Id.* Accordingly, the Supreme Court held that the district court's issuance of a permanent injunction was inappropriate since plaintiff was unable to prove at trial a threat of antitrust injury.

As the district court in *Phototron* recognized,

> [t]he linchpin of the *Cargill* decision is the requirement that a plaintiff seeking to *permanently* enjoin an allegedly unlawful business combination must allege and prove an actionable antitrust injury which results from the proscribed combination.

687 F. Supp. at 1067 (emphasis in original). The Fifth Circuit in reversing the judgment of the district court, however, quoted Justice Stevens' dissent in *Cargill* that the Supreme Court will not grant relief if there is merely " 'a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete.' " 842 F.2d at 100 (quoting 479 U.S. at 123 (Stevens, *J.*, dissenting)). While this may or may not be the law as it relates to the granting of permanent injunctive relief after a plenary trial on the merits, certainly a demonstrated probability at the preliminary injunction stage that a merger will adversely affect competition in the relevant market is sufficient in order to survive a motion for summary judgment. To the extent that *Phototron* requires *proof* of antitrust injury on an application for a preliminary injunction, we decline to follow its reasoning.

There is no question, as recognized by the district court in this case and by the Fifth Circuit in *Phototron*, that *Cargill* indeed "has imposed significant barriers to competitor attempts to enjoin merger transactions." *Phototron*, 842 F.2d at 102; *see* 689 F. Supp. at 82. If a competitor is attempting to establish standing to challenge a merger based solely upon a claim of threatened injury from predatory pricing, it faces the formidable task of convincing a court that the alleged antitrust injury is something other than mere losses due to "vigorous competition." *Cargill*, 479 U.S. at 116; *see Brown Shoe*, 370 U.S. at 320 (antitrust laws were enacted for "the protection of *competition*, not *competitors*") (emphasis in orig-

inal). Because the weight of economic evidence indicates that "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), and commentary cited therein, allegations of injury from such practices accordingly will be found to occur, "only infrequently." *Cargill*, 479 U.S. at 121. This is particularly true when the post-acquisition market share is insufficient to support an inference that predatory activity is likely to occur. It is important to note, however, that although the plaintiff in *Cargill* was unable to demonstrate a threat of antitrust injury, the Court expressly rejected the position of the United States, appearing in the case as *amicus curiae*, that there be a *per se* rule denying a competitor standing for "necessarily speculative" claims of post-acquisition predatory pricing. *Id.* at 120-21. In so holding, the *Cargill* Court explained that "[i]t would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur." *Id.* at 121.

While the Supreme Court's decision in *Cargill*, therefore, clearly has made competitor attempts to enjoin mergers more difficult, it has not rendered such attempts impossible. In our view, this case represents one of those instances envisioned by Congress where a competitor has standing under the Clayton Act "to arrest the creation of . . . [a] monopol[y] in [its] incipiency and before consummation." S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914); *accord* S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950); *Brown Shoe*, 370 U.S. at 317; *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957); *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 816 (2d Cir. 1979) (per curiam).

Nevertheless, we are mindful, as was the Fifth Circuit in *Phototron*, that "[g]iven the onerous effects of granting a preliminary injunction . . ., more than mere pleading is necessary to establish standing." 842 F.2d at 98; *see Buf-*

falo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir. 1981); *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). Even at the summary judgment stage, "antitrust law limits the range of permissible inferences [that may be drawn] from *ambiguous* evidence." *Matsushita*, 475 U.S. at 588 (emphasis added). In the instant case, unlike in *Cargill*, however, there is nothing ambiguous about the post-merger market share. *See* R. Bork, *The Antitrust Paradox* 221 & 406 (1978) (antitrust law should strike at horizontal mergers "creating very large market shares (those [over 60 or 70%] that leave fewer than three significant rivals in any market)").

That is not to say that an 84% market share is a *per se* violation of section 7 of the Clayton Act. Market share data, like any economic evidence, must be evaluated with care. *See United States Dep't of Justice 1984 Merger Guidelines*, 49 Fed. Reg. 26,823; *see also Cargill*, 479 U.S. at 121 n.17; *Matsushita*, 475 U.S. at 593-94. As we previously have recognized, market share data that does not accurately reflect probable market power may not be relied upon to invalidate a merger. *See United States v. Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984). At a plenary hearing on an application for a permanent injunction, Lipton is free to argue, for example, that the "hot beverage" market rather than the "herbal tea" market is the relevant market. Lipton claims here that there is "dispositive" economic evidence indicating that Bigelow, Lipton, Celestial and a host of others actually compete in the hot beverage market. If that is the case, Lipton's alleged post-acquisition 84% market share of herbal tea will indeed "dissolve[] into insignificance." Appellees' Brief at 10 n.8. That, however, is a judgment to be made by the district court following a full trial on the merits after giving due consideration to market share data, evidence of concerning Lipton's capacity to absorb

the market shares of rival competitors, barriers to entry and other factors.

At this stage of the proceedings, defendants concede for the purposes of disposition of their motion for summary judgment that the relevant market is "herbal tea." 689 F. Supp. at 79 n.3; *cf. Phototron*, 687 F. Supp. at 1063 (indicating that parties disputed whether *wholesale* photofinishing or *all* sources of photofinishing was relevant market for purposes of issuing preliminary injunction), *rev'd*, 842 F.2d at 97 (same). Market share data—assuming that it is accurate and indicative of substantial market power to eliminate competition—constitutes sufficient evidence, in and of itself, of antitrust injury to a competitor to create a genuine issue for trial. *See Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1265 (E.D. Pa. 1987) ("[n]othing else need be shown to demonstrate that defendants' acquisition impermissibly creates a probable anticompetitive effect"); *id.* at 1274 "[a]ll the predatory intent needed in this case is demonstrated . . . by the Clayton Act § 7 presumptions . . . [because], if realized, [they] would constitute antitrust injury"); *see also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 340.2g, at 365-66 (Supp. 1988); *cf. Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1246 (3d Cir. 1987) (*de minimis* foreclosure of competition in already heavily concentrated industry does not establish violation of § 7 or resultant antitrust injury), *cert. denied*, 108 S. Ct. 2830 (1988). Bigelow therefore is entitled to the benefit of all reasonable inferences that follow from the alleged deliberate acquisition by merger of substantial monopoly power in the herbal tea market and to a presumption that following the merger Lipton would be likely to eliminate competition in that market by, *inter alia*, reducing Bigelow's access to supermarket shelf space for its products.

CONCLUSION

Accordingly, because we find that plaintiff has demonstrated a substantial likelihood of sustaining "antitrust injury," the judgment of the district court granting defendants' motion for summary judgment is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Number B-88-299 (JAC)

R.C. BIGELOW, INC.

v.

UNILEVER N.V., THOMAS J. LIPTON, INC.,
CELESTIAL SEASONINGS, INC. and KRAFT, INC.

[Filed June 15, 1988]

Appearances:

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RULING ON MOTION FOR SUMMARY JUDGMENT

JOSÉ A. CABRANES, District Judge:

Plaintiff R.C. Bigelow, Inc. ("Bigelow"), the nation's third largest producer of herbal tea, seeks to enjoin a proposed merger of the two largest producers of herbal tea in the country. The question presented is whether Bigelow has made a sufficient showing of "antitrust injury" to establish standing under section 16 of the Clayton Act, 15 U.S.C. § 26.

Bigelow brings this action for injunctive relief against Unilever N.V. ("Unilever"), Thomas J. Lipton, Inc. ("Lipton"), Celestial Seasonings, Inc. ("Celestial"), and Kraft, Inc. ("Kraft"),[1] pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26. Bigelow alleges that the proposed acquisition by Lipton of Celestial will substantially lessen competition and create a monopoly in the national market for herbal teas, thereby threatening Bigelow with serious loss and damages. Defendants have moved for summary judgment on the ground that plaintiff lacks standing to assert its claim for injunctive relief.[2]

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[1] Celestial is a subsidiary of Kraft, and Lipton is a subsidiary of Unilever. Although Unilever has neither entered an appearance in this case nor responded in any other manner, the parties are in agreement that Unilever's presence in this action is unnecessary at this stage of the proceedings. *See* Certified Official Transcript of Hearing of June 10, 1988 (filed June 13, 1988) ("Transcript") at 13-14.

[2] Defendant originally filed a document entitled "Defendants' Memorandum in Opposition to Plaintiff's Request for a Temporary Restraining Order." At the hearing of May 31, 1988, the defendants agreed that that memorandum was, in effect, a motion to dismiss for failure to state a claim, and agreed to have the court consider the documents as such. At the same time, the court and the parties agreed on a schedule for expedited discovery prior to a hearing on defendants' motion and, if necessary, a hearing on plaintiff's motion for a preliminary injunction. Rule 12(b) of the Federal Rules of Civil Procedure provides that if, on a motion

On May 31, 1988, the court entered a temporary restraining order upon the consent of defendants Lipton, Celestial and Kraft enjoining defendants from carrying out the proposed transaction until either defendants' dispositive motion is granted, or a trial on the merits now scheduled for June 20, 1988 is concluded. A hearing on the motion for summary judgment was held on June 10, 1988. At that hearing, the parties represented that, if necessary, they were ready to proceed to a trial on the merits, and that no new or additional discovery would be necessary. *See* Certified Official Transcript of Hearing of June 10, 1988 (filed June 13, 1988) ("Transcript") at 61-63, 67-68. Accordingly, the motion for summary judgment is ripe for decision.

I.

In order to grant a motion for summary judgment, the court must determine that there is no "genuine issue as to any material fact" and that "the party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "material" fact is one whose resolution will affect the ultimate determination of the case. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). A factual dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The party opposing summary judgment must provide a factual basis for its allegations and may not rely on "mere speculation or conjecture as to the true nature of the facts." *Knight v. United States Fire Insurance Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987). In determining whether a material issue of fact exists, the court must resolve all am-

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to dismiss for failure to state a claim, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." At the hearing of June 10, 1988, the parties agreed that the court might treat the pending motion as one for summary judgment. *See* Transcript at 15.

biguities and draw all inferences *against* the moving party. *See Anderson*, 106 S. Ct. at 2509-11. Accordingly, the court must determine whether plaintiff has raised a genuine issue of material fact with respect to the threshold standing issue of "antitrust injury."

II.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides injunctive relief for private parties "threatened [with] loss or damage by a violation of the antitrust laws." In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986), the Supreme Court held that only a private plaintiff threatened with "antitrust injury" has standing to sue under section 16. In other words, "a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.' " 107 S. Ct. at 491 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Because the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*,' " *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in *Brown*), "only harm stemming from a reduction in competition qualifies as injury cognizable under the antitrust laws." *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24, 26 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1225 (1988). Activity which seeks to reduce competition is also referred to as "anticompetitive" or "predatory." *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847, 2857 (1985). In this case, therefore, the question is whether the proposed acquisition of Celestial by Lipton poses a threat of harm to Bigelow resulting from anticompetitive or predatory activity.

It is undisputed that the acquisition of Celestial by Lipton will result in Lipton's control of at least 80%

of the market in herbal teas.[3] *See* Exhibit 9 to Affidavit of Clayton A. Prugh (filed June 9, 1988) ("Prugh Affidavit"); Transcript at 20. A post-acquisition market share of 80% is more than sufficient to establish a *prima facie* showing of "monopoly power." *See United States v. Waste Management, Inc.*, 743 F.2d 976, 981 (2d Cir. 1984). It is clear, however, that "[t]he mere possession of monopoly power does not *ipso facto* condemn a market participant." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 262, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *see also Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 84-85 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). As the Court of Appeals for the Fifth Circuit recently observed, "[i]n *Cargill*, the [Supreme] Court required that the plaintiff not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury." *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988). Accordingly, the mere fact that Lipton will possess monopoly power after the proposed acquisition is not a sufficient showing that Lipton will exercise that power in a way that will cause antitrust injury to Bigelow. *See also* 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 710 (Supp. 1987) ("Mere monopoly pricing is not a violation of the Sherman Act.").

It is arguable that a showing of monopoly power would be sufficient if it were also shown that Lipton was acting with predatory intent when it sought to acquire Celestial. *See Aspen Skiing*, 105 S. Ct. at 2857 & n.28. Bigelow contends that Lipton intends to acquire Celestial in order to secure monopoly power and thereafter drive plaintiff out of the herbal tea market. In support of this contention, Bigelow argues that Lipton has paid "a substantial premium over the realistic value of Celestial"

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[3] Defendants agreed to assume for the purposes of this argument that the relevant market is "herbal tea" as opposed to "tea." *See* Transcript at 18.

and is prepared to pay this premium as a means to obtaining monopoly power. Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction (filed May 26, 1988) at 14. Bigelow has also submitted evidence showing that Lipton approached Bigelow one week after the proposed acquisition was announced expressing an interest to buy Bigelow. *See* Affidavit of David C. Bigelow (filed May 30, 1988) ("Bigelow Affidavit") at ¶ 34. In plaintiff's view, this evidence demonstrates that Lipton was acting with predatory intent when it sought to acquire Celestial.

There is nothing in the record, however, to indicate why the proposed purchase price for Celestial ought to be regarded as excessively high. More important, there is nothing in the record to suggest that Lipton was willing to pay a substantial premium in order to obtain monopoly power. To the contrary, there is evidence showing that Celestial was sold to Kraft four years earlier at a price within reasonable range of the price now being offered by Lipton. *See* Deposition of David W. Frost (filed June 9, 1988) at 15. Indeed, the president of plaintiff, David C. Bigelow, has testified that he would be willing to sell his own company (whose market share is less than a third of Celestial's) for a substantially *greater* sum than Lipton is offering to pay for Celestial. *See* Deposition of David C. Bigelow (filed June 10, 1988) ("Bigelow Deposition") at 253; Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss (filed June 9, 1988) ("Plaintiff's Memorandum") at 3. Mr. Bigelow also observed, with reference to the high value of his own company, that "franchises [sic] are very valuable today. I don't have to tell you. Franchises like Bigelow, Lipton, and Celestial [are] strongly valuable." *Id.* Finally, the evidence in the record supports Lipton's position that the purchase price reflects in part Lipton's expected cost savings and efficiencies. *See* Exhibit 13 to Prugh Affidavit; Attachment 3 to Affidavit of Andrew M.

Rosenfield (filed June 10, 1988) at Exhibit 1. Without some factual showing that Lipton's purchase price reflects a payment for monopoly power, plaintiff's allegations of predatory intent remain speculative.

Plaintiff has also submitted several of Lipton's internal memoranda for the purpose of demonstrating Lipton's intent to "eliminate competition" in the herbal tea market. *See* Exhibits 17, 18, 19, 20, 21, 23, 24 to Prugh Affidavit. However, these memoranda indicate nothing more than general competitive intent to "play hardball" with the competition. Bigelow Deposition at 158. They do not suggest that Lipton intended to "eliminate competition" by any means other than fair competition. To the contrary, the evidence demonstrates that Lipton simply intended to engage in "vigorous competition." *Cargill*, 107 S. Ct. at 492. Without evidence that Lipton's acquisition of Celestial is an attempt "to exclude rivals on some basis other than efficiency," Bigelow's allegations of predatory intent must fail. R. Bork, *The Antitrust Paradox* 138 (1978).

Although plaintiff has failed to raise a genuine issue of material fact regarding Lipton's intent in acquiring Celestial, plaintiff may nevertheless establish "antitrust injury" if it can show that there is a substantial likelihood that Lipton will engage in predatory activity after the acquisition. In this regard, Bigelow alleges several predatory practices in which Lipton is likely to engage, with resulting antitrust injury. These are: (a) predatory pricing; (b) improper control over retail store shelf space and promotional schemes; (c) improper control over distributors to retail stores; and (d) improper control over suppliers of raw herbs.

A.

Predatory pricing has been authoritatively defined by the Supreme Court as "pricing below an appropriate

measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill*, 107 S. Ct. at 493. Our Court of Appeals, in turn, has defined the appropriate measure of cost as "prices below reasonably anticipated marginal cost." *Northeastern Telephone*, 651 F.2d at 84. The Supreme Court has warned that "[c]laims of threatened injury from predatory pricing must . . . be evaluated with care," *Cargill*, 107 S. Ct. at 495 n.17, since predatory pricing schemes are infrequently attempted and their success is "inherently uncertain." *Matsushita Electric Industrial Co., Inc. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357 (1986).[4]

Although plaintiff alleges that Lipton will engage in selective and temporary price reductions for at least some brands to a level below cost, *see* Bigelow Affidavit at 22, plaintiff has nevertheless failed to submit any evidence whatsoever in support of this allegation. To the contrary, Mr. Bigelow stated in his deposition that he has "no idea what prices will do" after the proposed acquisition. Bigelow Deposition at 137. Upon being asked "[w]hat specifically, if anything, do you believe that Lipton will do in the marketplace for herb tea upon the consummation of [the proposed acquisition]," Mr. Bigelow responded, "If I were to answer that, I mean it would just be pure speculation on my part . . . as to what I would anticipate that they would do. I have no idea how they are going to manage the two companies." *Id.* at 138. Plaintiff's counsel concedes that plaintiff has submitted no evidence of past instances of predatory

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[4] The Supreme Court has also noted that "the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Cargill*, 107 S. Ct. at 495 n.17 (quoting *Matsushita*, 106 S. Ct. at 1360).

pricing, *see* Transcript at 52, and there is no evidence in the record to suggest a present intent to engage in any such activity in the future. The evidence relied upon by plaintiff in this case is similar to that found insufficient by the Supreme Court in *Cargill*, where the Court observed that the "evidence" of predatory pricing consisted "only of four passing references . . . to the possibility that [defendant's] prices might dip below cost." *Cargill*, 107 S. Ct. at 494. The Court found such evidence to "fall far short of establishing an allegation of injury from predatory pricing." *Id.* Similarly, plaintiff's unsupported and contradictory allegations of predatory pricing in this case are insufficient to establish a threat of antitrust injury.[5]

B.

In addition to predatory pricing, Bigelow argues that Lipton will induce supermarket chains to decrease or eliminate the amount of shelf space and the promotional schemes allocated to Bigelow. It has submitted evidence of Lipton's prior use of "planograms," or store shelf schematics, in support of its claim that Lipton will attempt to influence improperly retail stores. *See* Exhibits 33, 35 to Prugh Affidavit. Bigelow contends that Lipton, because it would command a monopoly share of the herbal tea market, could effectively require retailers to adopt these self-serving schematics or planograms.

The only material which Bigelow has submitted in support of this allegation, however, is a letter from its

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[5] Even if the court were to have found that plaintiff had raised a genuine issue of material fact with respect to whether there was a substantial likelihood that Lipton would engage in predatory pricing, plaintiff has failed to submit any evidence raising a genuine issue concerning Lipton's ability to absorb the market shares of its competitors once prices have been cut, and the barriers to entry in the market when prices are subsequently raised to supra-competitive levels. These factors are also essential to a claim of predatory pricing, *see Cargill*, 107 S. Ct. at 494 n.15, and plaintiff's failure to raise genuine issues of material fact with respect to them would also be fatal to its claim of predatory pricing.

attorney to the Federal Trade Commission which sets forth a list of retail chain stores which allegedly have adopted Lipton's tea department schematic. *See* Exhibit 35 to Prugh Affidavit. However, standing alone, this information, if taken as true for the purposes of this motion, fails to raise a genuine issue of material fact with respect to whether Lipton will improperly compel retail store chains to adopt its schematics. Indeed, defendants have submitted an affidavit by Zip Lemmerman, Senior Vice President, Merchandising, for Pathmark Supermarkets, in which Mr. Lemmerman states that "it is Pathmark, and not Lipton or any other supplier, which decides shelf location and how much space each product will receive in the allocation." Affidavit of Zip Lemmerman, Exhibit 3 to Defendants' Memorandum in Opposition to Plaintiff's Request for a Temporary Restraining Order (filed May 31, 1988). Bigelow does not contend that planograms are *per se* illegal, but rather, that Lipton will employ such schematics in an illegal manner. Without some evidence of a prior history of such behavior, however, or a present intent to engage in such behavior in the future, Bigelow has failed to raise a genuine issue of material fact on this claim.[6]

C.

Plaintiff also alleges as predatory activity that Lipton will exercise improper control over distributors and suppliers. With respect to distributors, Bigelow submitted no evidence that Lipton will attempt to interfere improperly with plaintiff's distributors. Indeed, Mr. Bigelow views these distributors as "loyal" to his company. Bigelow Deposition at 191. He noted that his company

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[6] Indeed, David C. Bigelow testified at his deposition that he does not expect Lipton to increase the amount of advertising and promotions for herbal tea previously expended by Lipton and Celestial. *See* Bigelow Deposition at 182. Mr. Bigelow even suggested that there might be a reduction. *See id.* at 247.

has "a longstanding relationship with these distributors and we are very, very strong with these people." *Id.* at 190. In fact, Mr. Bigelow stated that his distributors would have "no reason" at this time to anticipate reducing or eliminating their services to plaintiff. *Id.* at 187-88.

D.

With respect to suppliers, plaintiff contends that the proposed acquisition poses a threat that Lipton will exercise improper control over the raw herb market. Again, however, Bigelow's allegations lack factual support in the record. No evidence in the record has been brought to the court's attention to support Bigelow's claims that it will suffer any shortage of raw materials *as a result of the proposed acquisition.* Although Bigelow has submitted evidence suggesting that the raw herb market suffers from "major world shortages," Exhibit 29 to Prugh Affidavit, there is no evidence suggesting that Lipton will intentionally interfere with plaintiff's supply of raw herbs during these times of shortage. Accordingly, the court finds that plaintiff has failed to raise a genuine issue of material fact concerning Lipton's alleged predatory control over distributors and suppliers.

III.

As the Court of Appeals for the Fifth Circuit has observed, "*Cargill* has imposed significant barriers to competitor attempts to enjoin merger transactions." *Phototron Corp.*, 842 F.2d at 102. "Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities." *Id.* Although Bigelow asserts that at a later date it will be nearly impossible to unscramble the proverbial "scrambled eggs" of antitrust lore, *see* Plaintiff's Memorandum at 19,

it is the case that Bigelow will nonetheless have an action for treble damages and injunctive relief for any antitrust injuries that it may suffer.[7] Having failed at this preliminary stage to raise a genuine issue of material fact with respect to whether it is threatened with antitrust injury, plaintiff's claim must fail. Accordingly, defendants' motion for summary judgment must be granted.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is granted.

It is so ordered.

Dated at New Haven, Connecticut, this 15th day of June, 1988.

/s/ José A. Cabranes
JOSE A. CABRANES
United States District Judge

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[7] At oral argument, counsel for plaintiff contended that plaintiff would *not* have a remedy at law if Lipton were to engage in the alleged activity because the alleged predatory activity would be too difficult to prove. *See* Transcript at 55-56. If plaintiff concedes that he would not be able to prove that he had suffered antitrust injury once the alleged illegal activity occurred, then it is difficult to understand how the court could find that a substantial likelihood now exists that plaintiff will suffer antitrust injury in the future. *Cf. Cargill*, 107 S. Ct. 490 (noting that "[i]t would be anomalous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred").

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighth day of March, one thousand nine hundred and eighty-nine.

Docket Number 88-7505

R.C. BIGELOW, INC.,
Plaintiff-Appellant,

-v-

UNILEVER N.V., THOMAS J. LIPTON, INC.,
CELESTIAL SEASONINGS, INC., and KRAFT, INC.,
Defendants-Appellees.

[Filed Mar. 8, 1989]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendants-Appellees, UNILEVER N.V., THOMAS J. LIPTON, INC., CELESTIAL SEASONINGS, INC., and KRAFT, INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By /s/ Fred M. Cassidy
Ch. Deputy Clerk

Supreme Court, U.S.
FILED
AUG 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS J. LIPTON, INC., and KRAFT, INC.,

Petitioners,

vs.

R.C. BIGELOW, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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Dated: August 3, 1989

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QUESTIONS PRESENTED

1. Should the petition for certiorari be granted when:

- Petitioners claim they have abandoned the challenged transaction and have repeatedly represented to the courts below that the case is moot;

- The case has been remanded to the district court where discovery is being conducted on the issue of mootness; and

- The decision of the court of appeals is interlocutory, in effect denying petitioners' motion for summary judgment?

2. When two firms control 84% of a three-firm market and the third firm seeks to enjoin the acquisition of one firm by the other pursuant to section 16 of the Clayton Act: is the plaintiff firm, in opposing a motion for summary judgment returnable two weeks after commencement of the action, entitled to an inference that it is threatened with injury of the sort the antitrust laws are intended to prevent or must it prove actual injury to establish the existence of a genuine issue of material fact respecting its standing?

3. If the plaintiff firm was not entitled to such an inference, was summary judgment precluded when plaintiff adduced substantial, credible evidence that the acquiring firm was paying a price premium for market power, that the acquiring firm had in the past engaged in predation against competitors and that the acquiring firm intended to eliminate plaintiff from the market by denying it access to retail shelf space, coopting its distributors and denying it access to scarce raw materials?

LIST OF PARTIES

Thomas J. Lipton, Inc. ("Lipton")
Kraft, Inc. ("Kraft")
R.C. Bigelow, Inc. ("Bigelow")

Bigelow is a privately-owned corporation with no parent companies, subsidiaries or affiliates.

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Petitioners,

vs.

R.C. BIGELOW, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Respondent respectfully prays that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 867 F.2d 102 (1989), and is reproduced in petitioners' appendix, pp. la-l9a. The opinion of the United States District Court for the District of Connecticut is reported at 689 F. Supp. 76 (1988), and is reproduced in petitioners' appendix, pp. 20a-3la.

JURISDICTION

The courts below had jurisdiction of the subject matter, and the petition was timely filed in this Court. The subject matter of the petition, however, may be moot.

COUNTERSTATEMENT OF THE CASE

Introduction

Preliminarily, the Court should be aware that the petitioners themselves have asserted to the courts below that this matter is moot. Proceedings in the district court are underway, over their strenuous objection, to determine whether their representations were true that no live case or controversy exists within the meaning Article III of the United States Constitution. Also, this cause comes to the Court in the form of an interlocutory appeal from, in effect, a denial of petitioners' motion below for summary judgment.

Certiorari should also be denied because the court of appeals properly applied the decisions of this Court pertaining to the standing of a competitor to challenge anticompetitive conduct violative of Section 2 of the Sherman Act and Section 7 of the Clayton Act, and it properly found that significant issues of fact preclude summary judgment.

Statement of Facts

The facts as described in the opinion of the court of appeals, reported at 867 F.2d 102, 103-04 (3a, 4a),[1] are sufficient and need not be repeated.

However, Kraft and Lipton assert as a basic policy consideration in support of their petition for certiorari that competitors should be denied "standing" to object to acquisitions such as that before the Court on the supposition that competitors are trading their nuisance value for damages or they fear that the acquisition will sharpen competition because efficiencies will result in better products at lower prices to the consumer.

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[1] Citations to the opinions below refer to, and are hereinafter identified by, the page numbers in petitioners' appendix. All other appendix citations refer to respondent's Appendix and are referenced as (App.).

This supposition is diametrically opposite to the factual situation at hand. Bigelow does not seek damages. It seeks an injunction that will preserve competition in the market. Bigelow is in fact the most efficient producer and Lipton is apparently the least efficient producer and is seeking to buy its largest competitor for the purpose of achieving a monopoly which will "cover" the inefficiencies of its own operations. The impact of the attempted monopoly is not that there will be intensified competition with Bigelow but that competition will be eliminated by the pressures placed on supermarkets to eliminate the Bigelow product from supermarket shelves and the pressures placed upon the few sources of supply of crucial herbs to jeopardize Bigelow's access to those supplies.

As a matter of simple fact, the interest and the position of Bigelow are identical to those of the consumer in maintaining a competitive market in the herbal tea business.

Proceedings Below

By its complaint Bigelow sought to enjoin consummation of the acquisition of Celestial by Lipton, and the resulting control of 84% of the U.S. herbal tea market, as violative of Section 2 of the Sherman Act and Section 7 of the Clayton Act, 15 U.S.C. §§ 2 and 18.

Upon serving and filing the complaint, in which Lipton, Unilever, Kraft and Celestial were named as defendants, Bigelow moved for a temporary restraining order ("TRO") enjoining the acquisition. Prior to the service of answers, the district court held a hearing on May 31, 1988, on Bigelow's motion. At that hearing, counsel for defendants served a memorandum in opposition to Bigelow's motion which the district court deemed to be a motion to dismiss for lack of standing, pursuant to Fed. R. Civ. P. 12(b). The district court signed a TRO and directed expedited discovery solely on the standing issue. A hearing on defendants' motion was scheduled for June 10, 1988, and a hearing on Bigelow's motion for a preliminary injunction was scheduled for June 20, 1988.

On June 15, 1988, five days before the evidentiary hearing was scheduled to begin, the district court handed down a decision granting defendants' motion, which it treated as one for summary judgment. Specifically, the district court held that plaintiff had failed "at this preliminary stage to raise a genuine issue of material fact with respect to whether it is threatened with antitrust injury" and consequently it lacked standing to maintain this action. (31a) Bigelow immediately filed a notice of appeal and moved before the district court for a stay pending appeal to the United States Court of Appeals for the Second Circuit.

The district court denied the motion but stayed the acquisition until the Second Circuit could rule on a stay, provided such motion was filed within 24 hours. The next day Bigelow moved for a stay before the court of appeals. The court of appeals, in possession of the record of proceedings in the district court and briefs by the parties, heard argument on the stay motion on June 21, 1988. With petitioners asserting the requirement that the moving party must establish a strong likelihood of success on appeal, Judges Newman, Kearse and Cardamone unanimously granted from the bench an injunction prohibiting consummation of the acquisition pending Bigelow's appeal.

The court of appeals (Judges Altimari, Lumbard and Dearie) heard oral argument of the appeal on July 21, 1988. Then, on September 14, 1988, prior to the issuance by the court of appeals of an opinion on the merits, counsel for Kraft moved for dismissal of the appeal on the grounds that "the transaction at issue . . . has been abandoned by Kraft" and that "the appeal is moot." (App. A) Kraft further stated that it had sold Celestial to "another group not presently in the tea or herb[al] tea business." (App. A) The motion papers indicated that on September 12, 1988, Kraft entered into an agreement with an investment unit of Vestar Capital Partners, Inc. ("Vestar"), a firm specializing in leveraged buyouts, for a purported management-led buyout of Celestial. Lipton's counsel represented that it "ha[d] no objection to the dismissal of the appeal for mootness."

By order dated October 3, 1988, the court of appeals granted Kraft's motion to dismiss for mootness "on condition that the

parties agree to reasonable conditions by October 13, 1988." (App. B-3) Further, the court ordered "[i]n the event an agreement is not reached, the parties are directed to submit a proposed order, on notice, containing such reasonable conditions on or before October 21, 1988." (App. B-3) Bigelow asserted that the order of the district court denying it standing to protect itself should be vacated and that there should be an undertaking not to pursue the transaction in the future. The parties were unable to agree to reasonable conditions and on November 1, 1988, the motion to dismiss the appeal as moot was denied, with the notation: "Opinion to follow."

Two days later, Kraft and Lipton moved the court to reconsider denial of their motion and for a second time asked the court to dismiss the appeal as moot. Defendants stated that the purported management-led buyout of Celestial had in fact closed on November 1, 1988, that "now there can be *no* doubt" that the appeal is moot (App. C-2 emphasis in the original) and that "the public interest does not require an advisory opinion from this Court on any of the issues briefed and argued." (App. C-4-5) The renewed motion for dismissal of the appeal based on mootness was denied on November 22, 1988.

The petition submitted by Lipton and Kraft completely omits any reference to their repeated and emphatic representations to the court of appeals that the case is moot. Such a deliberate and material omission speaks for itself.[2]

On January 17, 1989, a unanimous court of appeals reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion.

The court found it had not been established by the facts available to it that the appeal was moot, adding that defendants had failed to satisfy their "heavy" burden of demonstrating that

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[2] On May 15, 1989, May 15, 1989 and May 16, 1989, respectively, prior to filing the petition for certiorari, Unilever, Lipton and Kraft filed answers in the district court each of which raises the affirmative defense that the action is moot. (App. D)

there is no "reasonable expectation" this same controversy will recur. It is this decision reversing the grant of summary judgment which petitioners now seek leave to appeal.

Defendants then moved for rehearing, with a suggestion for rehearing en banc. This was denied on March 8, 1989. No judge of the court of appeals voted in favor of rehearing.

The mandate from the court of appeals finally issued on March 21, 1989. Then, on March 23, 1989, counsel for Lipton wrote to the district court requesting that "this litigation be held in abeyance" pending a decision by this Court on a petition for certiorari. Bigelow opposed that request as nothing more than a means of sidetracking an examination of the issue of mootness in the district court while seeking relief in this Court on the assumption that there is a case or controversy.

At a status conference on May 5, 1989, the district court rejected defendants' demand that, on grounds of "the economy of judicial administration," the case be held in abeyance pending action by this Court on defendants' yet-to-be-filed petition for certiorari. It set a schedule which included the filing of answers by the defendants and discovery on the limited issue of mootness, with such discovery to be completed by September 1, 1989. Defendants have served answers to the complaint, asserting therein that the issues are "moot"; responded to interrogatories; produced documents; and been deposed for the purpose of completing a factual record upon which the district court can determine whether this action is moot.

REASONS FOR DENYING THE WRIT

POINT I

THIS ACTION IS NOT APPROPRIATELY BEFORE THE COURT.

This action is now in the preliminary stage of pleadings, discovery and motions in the district court. There has yet to be an evidentiary hearing. The petition is based on the reversal of

an order of summary judgment respecting Bigelow's standing, placing it in an essentially interlocutory posture.

Moreover, there is a more serious question respecting petitioners' own "standing" to seek review by this Court. The exercise of judicial power by a federal court requires the existence of a case or controversy within the meaning of Article III of the Constitution. Federal courts have no power to issue advisory opinions or "to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Rather, each federal court's judgments must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The Court has established that "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *see also DeFunis v. Odegaard*, 416 U.S. 312 (1974).

The order of the court of appeals remanded the case to the district court for further proceedings. The Second Circuit held that, notwithstanding defendants' claims that the transaction at issue had been abandoned and that the case was moot, it retained jurisdiction to decide the appeal under the "capable of repetition, yet evading review" doctrine, citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). (7a)

The opinion makes clear that although the defendants had failed to present sufficient facts to satisfy their "heavy" burden and avoid an adverse appellate decision on the merits, significant questions of fact remained regarding the purported "mooting" event, *i.e.*, the claimed abandonment by Kraft of the sale of Celestial to Lipton and alleged sale to Vestar. Discovery proceedings are underway in the district court for the purpose of completing the factual record as to outstanding mootness issues and to permit the district court to make an informed, final determination whether this case is now moot.

Petitioners have turned the matter of mootness on and off as a mere device to achieve an immediate tactical advantage. After oral argument, they did not want the Second Circuit to rule on the antitrust issues and so they sought dismissal based on mootness. Now, having lost in the court of appeals, they seek to forestall a determination in the district court on their own claims of mootness while they seek another chance to prevail on the antitrust issues in this Court.

Petitioners not only ignore their own claims of mootness, but fail to disclose completely in their petition the pertinent facts which they repeatedly affirmed had rendered this case moot.[3] Moreover, they make no mention whatsoever of the fact that discovery on the mootness issue is now being conducted in the district court, where the litigation is now proceeding in accordance with the mandate of the court of appeals. Such deliberate omissions violate this Court's instruction that counsel have a " 'continuing duty to inform the Court of any development which may conceivably affect the outcome' " of the case. *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985), quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). Further, such omissions may violate Rule 34.1(g) of this Court (petitioner's statement of the case shall contain all that is material to the consideration of the questions presented).

This Court should deny the petition and permit the litigation to proceed in the district court. Should the district court determine that the case is not moot, it will then conduct proceedings on the merits of respondents' claims. In that event, petitioners would not be deprived of an opportunity to petition this Court for review after entry of a final judgment.[4]

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[3] Petitioners make a passing reference to the mootness issue in the final pages of their argument, but fail in their "Statement of the Case" or discussion of the "Proceedings Below" to identify the present status of the case in the district court or to discuss any of the facts supporting their claims as to mootness.

[4] *See, e.g., Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) ("However, because the Court of Appeals remanded the case, it is not yet ripe for review by this court. The petition for a writ of certiorari is denied.")

Should the district court decide that the case is moot, it will enter an appropriate order of dismissal. Petitioners' suggestion that this Court should undertake to decide the mootness issue on an incomplete record and then vacate the opinion of the court of appeals, thereby reinstating the opinion of the district court (Petition at 17), is absurd.

POINT II

THE SECOND CIRCUIT'S OPINION IS A PROPER APPLICATION OF THE LAW CONSISTENT WITH *CARGILL* AND OTHER DECISIONS OF THIS COURT.

The distinctive feature of this case is that the threat to Bigelow comes from a deliberate acquisition of overwhelming monopoly power and the consequent exposure of Bigelow to being cut off from its customers at the retail level and from its suppliers of crucial ingredients. Bigelow, in a fight for its commercial life, seeks an injunction to assure a competitive market - which is also in the public interest - not damages.

The court of appeals viewed the issue before it as a narrow one, limited by the procedural posture of the case: "does a competitor [Bigelow] have standing under the Clayton Act to enjoin the proposed merger of the two largest producers in the relevant market whose post-acquisition market share is more than sufficient to establish a *prima facie* showing of monopoly power and a presumption of illegality?" (10a) The court found that at this early stage, the stark, uncontested facts as to market structure were sufficient to give rise to a rebuttable presumption of antitrust injury to Bigelow.[5] The use of such a presumption is entirely consistent with *Cargill, Inc. v. Monfort of Colo.*,

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[5] The court did *not* adopt the conclusion of the district court that Bigelow had not submitted sufficient evidence of the threat of antitrust injury. (Petition at 12) Rather, because of the presumption adopted, it did not reach the substantial evidence of predation in the record (Point III, *infra*).

Inc., 479 U.S. 104 (1986), and with this Court's decisions from *Brown Shoe Co. v. United States*, 320 U.S. 294 (1962) to the present.

Cargill, which came to this Court after the equivalent of a full trial and final judgment, requires proof of antitrust injury. The Second Circuit did not dispense with that requirement, but found it applicable "to the granting of permanent injunctive relief *after a plenary trial on the merits.*" (15a) (emphasis added) It rejected petitioners' argument that *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988), correctly read *Cargill* as requiring proof of antitrust injury at the preliminary injunction stage. Since neither the majority nor Justice Stevens' dissent in *Cargill* addressed the quantum of proof required on a motion for summary judgment returnable two weeks after commencement of an action, the decision below is clearly consistent with *Cargill*.[6] It is consistent

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[6] To the extent the Second and Fifth Circuits may disagree as to the plaintiff's burden of proof on a preliminary motion, it is largely a function of the differing standards they applied. In *Phototron*, the court held that on a preliminary injunction motion plaintiff must show "a substantial likelihood that plaintiff will prevail on the merits," including the issue of antitrust injury. It further found that because the district court had determined that the pleadings were sufficient, a remand was required. 842 F.2d at 98. Rather than remand, however, the court then undertook the task of weighing the evidence of record and found it insufficient.

Here, the Second Circuit found it necessary to determine only "whether plaintiff has raised a genuine issue of material fact sufficient to show a threat of antitrust injury." (11a) Rather than undertaking to evaluate the entire factual record, a task not commonly assumed by appellate courts, it found that Bigelow was entitled to "all reasonable inferences that follow from" the unambiguous and uncontested market share data (18a), and remanded for a full preliminary injunction hearing and trial, neither of which had occurred.

The difference in approach taken by the two courts is hardly a "major difference in the regulation of mergers" (Petition at 16) that requires immediate resolution by this Court. If the case survives mootness analysis in the district court, there will be opportunity for review after entry of final judgment.

with the antitrust policy articulated by this Court because it refuses to foreclose access to the federal courts in cases involving mergers of most dubious legality by adopting a standard of proof that is unrealistic or impossible to meet.

In addition, unlike *Cargill*, this is not primarily a predatory pricing case.[7] To the contrary, Bigelow's principal claims concern the threat of the sort of devastating anticompetitive acts for which post-injury relief would be ineffectual: forcing Bigelow off the shelves of supermarkets, cutting off its raw material supplies and stealing its distributors (who can carry only a limited number of lines and could not handle both Lipton-Celestial and Bigelow).

Bigelow's concerns arise in the context of an attempted acquisition by Lipton that would give it 84% of the national herbal tea market, which was conceded to be the relevant product and geographic market. (5a) Unlike *Cargill*, where the second and third largest competitors combined for a joint market share of only 20.4% (which was well below the market share of the remaining industry leader whose share was 27.3%), petitioners here are Bigelow's *only* other nationwide competitors. *Cargill* indicated that a limited market share of only 20% was insufficient to successfully conduct the predatory pricing alleged.[8] Accordingly, the Court held that the only showing of injury to plaintiff was a potential loss of profits as a result of increased

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[7] Although Bigelow alleged in its complaint, *inter alia*, the risk of below-cost predatory pricing, Bigelow consistently took the position throughout the proceedings below that this was the least of its several concerns. There was unchallenged evidence of predatory pricing by Lipton in the record: Mr. Bigelow testified as to prior predatory price cutting by Lipton and statements at the time by a Lipton officer to the effect that Lipton had assembled a "war chest" and "whatever it took to sell below cost, whatever, they [Lipton] weren't going to get beaten."

[8] Although no allegation of below-cost pricing was made before the district court in *Cargill*, this Court predicted that a predatory pricing claim would probably fail because of lack of market share. 479 U.S. at 119-20, n. 15.

competition, which did not constitute "antitrust injury."[9] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1983) (plaintiff did not have standing to complain that its profits were reduced by defendant's acquisition of a bankrupt company that would otherwise have gone out of business, because the injury resulted from increased competition).

Those facts are far different from those presented here: Lipton, which had a declining 32% market share, had failed in all attempts at legitimate competition and finally resorted to an attempt to purchase monopoly power outright by offering a preemptive price for the 52% market share of its only major competitor. Bigelow seeks an injunction, not damages, to preserve a competitive market. Its interest and the public interest are manifestly identical.

The Second Circuit held that Lipton's deliberate attempt to acquire overwhelming monopoly power gave rise to a rebuttable presumption that such power would be exploited, *i.e.*, that it would be used in a predatory manner against the only remaining competitor of significance - Bigelow.[10] The Second Circuit also noted that, "Within a week following Lipton's announcement that it planned to acquire Celestial, Lipton allegedly approached Bigelow, expressing an interest in negotiating the purchase of plaintiff [Bigelow], the only remaining competitor in the herbal tea market with a significant market share." (4a) The Second Circuit found that in opposing a motion for summary judgment Bigelow was entitled to the benefit of all reasonable inferences from such actions, including a presumption that following the merger Lipton would be likely to eliminate competition by, *inter alia*, reducing Bigelow's access to supermarket shelf space for its products. (18a) That inference is not only

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[9] In *Cargill*, the plaintiff conceded that there would be increased competition and lost profits, but that it would not be driven from the market. Bigelow makes no such concession.

[10] Although counsel for Lipton would not concede, at oral argument before the Second Circuit, that 84% was sufficient to create monopoly power (prompting Judge Lumbard to inquire whether 99% control was necessary), the district court and the court of appeals specifically found that 84% constituted a *prima facie* showing of monopoly power. (12a, 24a)

consistent with *Cargill*, but is mandated by Section 2 of the Sherman Act and Sections 7 and 16 of the Clayton Act, which prohibit deliberate acquisition of monopoly power.[11]

In effectuating the policies of the antitrust laws, this Court has consistently recognized the utility of presumptions arising from the acquisition of competitors.

In *United States v. Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963), the Court, in order to "simplify the test of illegality" under Section 7 of the Clayton Act, held that a presumption that an acquisition is unlawful may arise from market share and concentration data without "elaborate proof of market structure, market behavior or probable anticompetitive effects." That presumption has been consistently applied. In *United States v. Aluminum Co. of America*, 377 U.S. 271, 279-80 (1964), the Court, relying on *Philadelphia National Bank*, invalidated a merger that would have increased Alcoa's market share by only 1.3%. *See also, United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-51 (1966); *United States v. Citizens and Southern Nat'l Bank*, 422 U.S. 86, 120-21 (1975).

Another firmly established presumption is that "no monopolist monopolizes unconscious of what he is doing" and that "improper exclusion (exclusion [of competitors] not based on efficiency) is always deliberately intended." *Aspen Skiing Co. v.*

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[11] The district court's determination that mere possession of market power does not *ipso facto* condemn a market participant absent predatory intent ignored the manner of acquisition of that power. (24a) Although citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 262, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) for this proposition, the district court missed the essential continuation of the cited passage:

> But, to avoid the proscriptions of § 2, the firm must refrain at all times from conduct directed at smothering competition. *This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant.* And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market (emphasis added).

Aspen Highlands Skiing Co., 472 U.S. 585, 602-03 (1985), quoting Judge Hand in *Alcoa*, 148 F.2d at 432 and R. Bork, *The Antitrust Paradox*, 160 (1978).

Such presumptions are not necessarily conclusive; their effect is to shift to the defendant the burden of showing at trial "affirmative justifications" for the proposed merger. *Philadelphia National Bank*, 374 U.S. at 370-71. The shifting of the burden of going forward was what the Court referred to in *United States v. General Dynamics Corporation*, 415 U.S. 486, 498 (1974), in finding that the defendant had carried the burden of rebutting the *prima facie* case made by the government. This is in accordance with the standard for standing issues generally, which recognizes that proof of injury is not required to invoke, initially, the jurisdiction of a court. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Here, the challenged acquisition if completed will create monopoly power in violation of both Section 7 of the Clayton Act and Section 2 of the Sherman Act. Here, an actual reduction of competition among former competitors is patent and admitted. Here, injury to the only remaining competitor is both a real threat and a logical presumption.

The court of appeals left open the possibility that at a plenary trial Lipton might be able to establish a relevant market in which its share would not be presumptively unlawful or that it would be unable to engage in successful predation because of low barriers to entry. (17a-18a) Those defenses, which can only be adjudicated after a full trial on the merits, are inextricably intertwined with the issue of threatened injury to Bigelow. Unless the evidence is viewed as a whole, merger cases will dissolve into a rush to judgment in which those mergers that have the least economic justification will escape scrutiny because of the plaintiff's inability to marshall all of its proof within a few days after commencement of an action.

The loss of such scrutiny would deal a major blow to antitrust enforcement. As Professor Bork has stated, the law should strike at horizontal mergers "creating very large market shares that

leave fewer than three significant rivals in any market," R. Bork, *The Antitrust Paradox*, 221, 406 (1978), exactly the situation presented here. The reasons are as follows:

> The correct interpretation of Clayton 7 begins with the answer to a basic question: Why should the law apply more severe standards to corporate size achieved by merger than to the same size achieved by growth? A number of possible answers have been given, but only one is consistent with both the statute and the goal of consumer welfare: size by internal growth demonstrates superior efficiency, but merger that creates real market control will certainly have the effect of restricting output and may or may not create new efficiencies. Thus, it is intelligible, though not inevitable, social policy to apply a stricter standard to mergers.

Id. at 199.

POINT III

BIGELOW PRESENTED SUFFICIENT EVIDENCE OF FACTUAL ISSUES TO PRECLUDE SUMMARY JUDGMENT.

Bigelow's evidence was presented in the context of a motion to dismiss the complaint which, after seven days of discovery directed solely to the issue of standing, was deemed converted to a motion for summary judgment. The district court made its determination even before a full preliminary injunction hearing. Petitioners argue, however, that Bigelow's proof of prior episodes showing Lipton/Unilever's predatory practices and their payment of a premium price for effective monopoly power were insufficient to establish threatened injury and that, prior to its consummation, Bigelow was required to submit conclusive proof of actual injury that would result from the challenged acquisition. (Petition at 16)

Petitioners' argument is contrary to the holding of *Cargill* which determined the standard to be *the threat* of antitrust

injury. Indeed, *Cargill* specifically distinguished between damage claims under Section 4, which requires a plaintiff to show "actual" injury, and Section 16, which only requires the showing of "threatened" loss or damage.

Because it found a sufficient threat of injury to Bigelow to flow from the uncontested facts as to market structure, the court of appeals was not required to analyze the additional evidence submitted by Bigelow. Bigelow did, however, submit substantial evidence of predatory intent — a surprising amount given the seven days Bigelow was allotted by the district court to review over 350,000 pages of documents defendants had submitted to the Federal Trade Commission in the course of a six month Hart-Scott-Rodino investigation. Bigelow's evidence was either ignored by the district court or was deemed to be merely evidence of "hard ball" competition. However, as this Court has often recognized, what may be permissable "vigorous" competition in a competitive market becomes predation when directed by an intentional monopolist at its only competitor. *See, e.g., United States v. Colgate & Co.*, 250 U.S 300, 307 (1919).

Bigelow's evidence included unrebutted testimony that within one week of Lipton's announcement of its intended acquisition of Celestial, Lipton approached Bigelow to see if it were for sale.[12] That fact was noted by the district court: "In plaintiff's view, this evidence demonstrates that Lipton was acting with predatory intent when it sought to acquire Celestial." (26a) Inexplicably, the district court never again discussed the probative value of this unrebutted evidence.[13] That omission was not lost upon the court of appeals. (4a)

---

[12] The combined market shares of Lipton/Celestial/Bigelow would have been approximately 97%.

[13] The district court tacitly acknowledged that monopoly power *arguably* would be sufficient to prove standing under Section 16 if defendants were acting with predatory intent. (24a)

Bigelow also submitted evidence supporting its claim that Lipton was paying a substantial monopoly premium for Celestial.[14]

Bigelow submitted additional credible evidence that there were world-wide shortages of critical herbs and that Lipton had previously attempted to corner various other markets of limited supply (including decaffeinated tea and tea bagging machinery). Evidence of Lipton's prior efforts to control shelf space and distribution and of Bigelow's inability to counter the combined promotional and advertising budget of Lipton/Celestial was submitted to the district court.

At the hearing before the Second Circuit on the stay pending appeal, the court expressed incredulity at petitioners' argument that Lipton's documents were merely indicative of "vigorous" competition.[15] Those documents included statements that "eliminating competition is the course we should pursue"; directions to employees regarding "keeping competitors out of the tea section [in supermarkets]"; intentions to reduce "Bigelow tea visibility" in all accounts; statements that Lipton would not restrict itself to normal competition ("natural death") in getting rid of competitors and that it intended to push Bigelow off the shelves of supermarkets; and assertions that Lipton would bring pressure to bear on distributors not to carry Bigelow products and use its position to gain preferences in the allocations of scarce herbs. An independent consultant retained by Lipton was publicly quoted as stating that after the acquisition of Celestial, "Lipton is going to hammer Bigelow in retail groceries."

---

[14] This evidence included, *inter alia*, Kraft's own investment banker's evaluation which was approximately half the Lipton price; a price earnings analysis which placed Lipton's price at more than 87 times projected net earnings, and more than 150 times actual earnings (conservatively estimated, considering Celestial had net losses in 1984 and 1985, respectively, and had no earnings in 1986). Moreover, the district court's comparison of the purchase price paid by Kraft four years before with that which Lipton was prepared to pay (25a) completely ignored the evidence submitted by Bigelow that Celestial had consistently lost or failed to make money for Kraft.

[15] The tape of the June 21, 1988 hearing before the court of appeals is available at the Courthouse. No written transcript of the hearing was made.

The Court in *Cargill* declined the invitation of the United States to enunciate a *per se* rule denying competitors standing to challenge acquisitions (on the basis of predatory pricing theories). 479 U.S. at 121. Petitioners here attempt to revisit the issue. They seek, in effect, a *per se* rule that will deny every competitor standing to seek injuctive relief by requiring proof of actual, not threatened, injury resulting from predation by the merged entity. Because such proof cannot come into being until after the challenged merger is consummated, the burden is one which can never be met. Adoption of petitioners' standard would make Section 16 of the Clayton Act a dead letter and effectively terminate private enforcement of Section 7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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R.C. Bigelow, Inc.

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APPENDIX

United States Court of Appeals
FOR THE SECOND CIRCUIT

R.C. Bigelow, Inc.,
Appellant,

v.

Unilever N.V., Thomas J. Lipton, Inc., Celestial Seasonings, Inc., and Kraft, Inc.,
Appellees.

88-7505

NOTICE OF MOTION
state type of motion
for
Dismissal for Mootness

Use short title

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Kirkland & Ellis
200 E. Randolph
Chicago, Illinois 60601
(312) 861-2000
Tefft W. Smith, Esq.

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

(Lipton has no objection. Bigelow objects.)

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: Argued on July 21, 1988

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and attorney in charge of case)*

Windels, Marx, Davies & Ives
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(212) 237-1000
Paul Windels, Jr., Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
United States District Court for the District of Connecticut, Judge Jose A. Cabranes

Brief statement of the relief requested:

The transaction at issue – the acquisition by Lipton of Celestial Seasonings from Kraft – has been abandoned by Kraft. Kraft has sold Celestial Seasonings to another group not presently in the tea or herb tea business. Accordingly, the appeal is moot and should be dismissed.

By: *(Signature of attorney)*

/s/ Tefft W. Smith
Tefft W. Smith

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appearing for: *(Name of Party)*

Appellee or Respondent
☐ Plaintiff ☐ Defendant

Date 9/14/88

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is
granted denied

Previous requests for similar relief and disposition.

None.

Statement of the issue(s) presented by this motion:

Whether this appeal is now moot in that the transaction being challenged by Bigelow has been abandoned by the parties with the Celestial Seasonings business being sold by Kraft to another party not presently engaged in the tea or herb tea business.

Brief statement of the facts (*with page references to the moving papers*): The December 5, 1987 purchase contract between Kraft and Lipton permitted either party to cancel the contract at various points. The parties had extended the date until June 1, 1988. On May 26, 1988, Appellee-plaintiff Bigelow filed its complaint to enjoin the transaction in the United States District Court for the District of Connecticut. Kraft and Lipton agreed on May 31, 1988 to postpone closing until the District Court completed its hearing. On June 15, 1988 the District Court entered summary judgment in favor of defendants-appellees. Plaintiff-appellee moved for a stay, which the District Court denied on June 16, 1988. Plaintiff-appellee moved for a stay pending appeal before this Court. The Court granted a stay on June 21, 1988, and ordered expedited briefing and appeal. The case was set for argument and was argued on July 21, 1988. On August 26, 1988 the parties again extended the termination date of the contract until September 2, 1988. On September 11, 1988, Kraft notified Lipton that Kraft was canceling the December 5, 1987 contract. On September 12, 1988, Kraft entered into an agreement with an investment unit of Vestar Capital Partners, Inc. (C.S. Herb Holdings, Inc.) for a management-led buy-out of Celestial Seasonings.

Summary of the argument (*with page references to the moving papers*):

The only relief sought in the complaint below was an injunction against the acquisition of Celestial Seasonings by Lipton. That transaction will not be taking place. No live issue remains for resolution by this Court, the appeal should be dismissed. *See, e.g., Trane Co.* v. *O'Connor Securities*, 718 F.2d 26 (2d Cir. 1983) (dismissing appeal from the denial of a preliminary injunction as moot where the challenged potential transaction at issue there was abandoned).

United States Court of Appeals
FOR THE SECOND CIRCUIT

R.C. Bigelow, Inc.,

Appellant, 88-7505

v.

Unilever N.V., Thomas J. Lipton, Inc., Celestial Seasonings, Inc., and Kraft, Inc.,

Appellees.

NOTICE OF MOTION
state type of motion
for
Dismissal for Mootness

Use short title

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Kirkland & Ellis
200 E. Randolph
Chicago, Illinois 60601
(312) 861-2000
Tefft W. Smith, Esq,

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

(Lipton has no objection. Bigelow objects.)

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: Argued on July 21, 1988

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and attorney in charge of case)*

Windels, Marx, Davies & Ives
156 West 56th Street
New York, New York 10019
(212) 237-1000
Paul Windels, Jr., Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
United States District Court for the District of Connecticut, Judge Jose A. Cabranes

Brief statement of the relief requested:

The transaction at issue – the acquisition by Lipton of Celestial Seasonings from Kraft – has been abandoned by Kraft. Kraft has sold Celestial Seasonings to another group not presently in the tea or herb tea business. Accordingly, the appeal is moot and should be dismissed.

By: *(Signature of attorney)*

/s/ Tefft W. Smith
Tefft W. Smith

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appearing for: *(Name of Party)*

Appellee or Respondent
☐ Plaintiff ☐ Defendant

Date 9/14/88

ORDER

Before: Hon. J. Edward Lumbard, Hon. Frank X. Altimari, Circuit Judges and Hon. Raymond J. Dearie, District Judge.

IT IS HEREBY ORDERED that this motion is granted on condition that the parties agree to reasonable conditions by October 13, 1988. In the event an agreement is not reached, the parties are directed to submit a proposed order, on notice, containing such reasonable conditions on or before October 21, 1988.

Elaine B. Goldsmith, Clerk

/s/

By: Edward J. Guardino, Deputy Clerk

October 03, 1988

United States Court of Appeals
FOR THE SECOND CIRCUIT

R.C. Bigelow, Inc.,
Appellant,
v.
Unilever N.V., Thomas J. Lipton, Inc., Celestial Seasonings, Inc., and Kraft, Inc.,
Appellees.

Use short title

88-7505

NOTICE OF MOTION
state type of motion
for
Petition to Reconsider Dismissal for Mootness (Confidential – Filed Under Seal Pursuant to Court Order)

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Kirkland & Ellis
200 E. Randolph
Chicago, Illinois 60601
(312) 861-2000
Tefft W. Smith, Esq,

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

(Lipton has no objection. Bigelow objects.)

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: Argued on July 21, 1988

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and attorney in charge of case)*

Windels, Marx, Davies & Ives
156 West 56th Stree:
New York, New York 10019
(212) 237-1000
Paul Windels, Jr., Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
United States District Court for the District of Connecticut, Judge Jose A. Cabranes

Brief statement of the relief requested:

The management-led buyout of Celestial to Vestar Capital Partners, Inc. (C.S. Herb Holdings, Inc.), a group not presently in the herb tea business, closed on November 1, 1988. Now there can be *no* doubt that the transaction at issue in this case — the sale of Celestial to Lipton — will not occur. Thus, Appellees ask the Court to dismiss this case as moot and enter appellees October 21, 1988 proposed order of dismissal. (Ex. A)

By: *(Signature of attorney)*

/s/ Tefft W. Smith
Tefft W. Smith

Appellant or Petitioner:
☐ **Plaintiff** ☐ **Defendant**

Appearing for: *(Name of Party)*

Appellee or Respondent
☐ **Plaintiff** ☒ **Defendant**

Date 11/3/88

ORDER

IT IS HEREBE ORDERED that the moton be and it hereby is
granted denied

Previous requests for similar relief and disposition. On September 14, 1988, appellees submitted a motion to dismiss the appeal for mootness and supporting affidavits. On October 3, 1988, the Court granted appellees' motion to dismiss on the condition the parties agree to "reasonable conditions." The parties were unable to do so. Pursuant to the Court's October 3, 1988 order, on October 21, 1988 the parties submitted proposed orders of dismissal. On November 1, 1988, the Court notified appellees that their September 14, 1988 motion to dismiss for mootness was denied because there was a danger the transaction could occur, presumably because the Kraft and Vestar transaction had not yet been consummated.

Statement of the issue(s) presented by this motion: Whether this appeal is now moot in that there is no possibility the transaction being challenged by appellant can occur because Celestial has been sold to another party, not presently in the tea or herb tea business.

Brief statement of the facts (with page references to the moving papers): On December 5, 1987 Kraft entered a contract to sell Celestial to Lipton. The contract permitted either party to cancel the contract at various points. The original closing date was scheduled for May 1, 1988 — well before the critical cold-weather selling season. Kraft and Lipton agreed to postpone the closing while the FTC completed its review of the transaction. On May 26, 1988, Bigelow filed its complaint to enjoin the transaction. The FTC cleared the transaction, as announced in the Wall Street Journal on June 15, 1988 — the same day the district court entered summary judgment in appellees' favor. On June 16, 1988, the district court denied appellant a stay. On June 21, 1988, this Court granted appellants' motion for a status quo stay and ordered an expedited appeal. The case was argued on July 21, 1988. On August 26, 1988, Lipton and Kraft agreed to extend the contract termination date to September 2, 1988, almost

twelve weeks after the stay. On September 11, 1988, although not legally bound to do so, Kraft terminated its agreement with Lipton because a) Celestial's peak marketing and manufacturing season had arrived and the business was suffering adverse effects from being in operational "limbo"; and b) because it had an opportunity to enter an agreement, led by Celestial's management, to buy-out Celestial on more favorable terms. Appellees's September 14, 1988 motion to dismiss this appeal for mootness and supporting affidavit to this Court accurately represented: Celestial "was being sold" and that "on September 12, 1988, Kraft entered into an agreement with an investment unit of Vestar . . . for a management-led buyout of Celestial." (Appellees' 9/14/88 motion, p. 2; T. Smith's 9/14/88 Aff. ¶ 2, p. 2.) As sworn to by R. Wertheimer, counsel for appellee, Lipton has no connection with C.S. Herb Holdings, Inc. or Vestar Capital Partners Inc. or any of their principals or affiliates. (Wertheimer 9/26/88 Aff. ¶ 3.) Lipton or Unilever never planned to, or in fact actually ever did, invest in or participate in any other way in the management-led buy-out of Celestial. (Wertheimer 9/26/88 Aff. ¶ 4; Spear 11/3/88 Aff. ¶ 5.) As attested to in the attached Spear affidavit, the Kraft/Vestar transaction closed on November 1, 1988. Thus, there is no possibility the transaction which Bigelow complained of — Kraft's sale of Celestial to Lipton — can occur.

Summary of the argument (with page references to the moving papers): The only relief sought in the complaint below was an injunction against Kraft's sale of Celestial to Lipton. The sale of Celestial to an investment unit of Vestar Capital Partners, Inc. (C.S. Herb Holdings, Inc.) as part of a management-led buyout, was closed on November 1, 1988. (*See* attached Spear affidavit.) Thus, no live issue remains for resolution by this Court, and the appeal should be dismissed. *See e.g., Trane Co. v. O'Connor Securities*, 718 F.2d 26 (2d Cir. 1983) (dismissing appeal from the denial of a preliminary injunction as moot where the challenged transaction at issue was abandoned). Furthermore, the "matter of reimbursement of Bigelow's attorneys' fees," if any, is properly presented to the district court, not the court of Appeals, in any event. Finally, the public interest does not require an advisory opinion from this Court on any of the

issues briefed and argued. (*See also* Appellees' September 14, 1988 Motion to Dismiss for Mootness and supporting affidavit; Appellees' September 26, 1988 Reply Memorandum and supporting affidavits; and Appellees' October 21, 1988 Memorandum in Support of its Proposed Order to Dismiss for Mootness.)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

R.C. BIGELOW, INC.,

Plaintiff,

v.

UNILEVER N.V., THOMAS J. LIPTON, INC., CELESTIAL SEASONINGS, INC. and KRAFT, INC.,

Defendants.

Civil Action No.

B-88-299 (GAC)

ANSWER OF DEFENDANT UNILEVER N.V.

Defendant Unilever, N.V. ("Unilever") hereby answers the Complaint of Plaintiff R.C. Bigelow, Inc. ("Bigelow").

* * *

FOURTH DEFENSE

The claims set forth in the Complaint are moot.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

R.C. BIGELOW, INC.,

Plaintiff,

v.

UNILEVER N.V., THOMAS J. LIPTON, INC., CELESTIAL SEASONINGS, INC. and KRAFT, INC.,

Defendants.

Civil Action No.

B-88-299 (GAC)

ANSWER OF DEFENDANT THOMAS J. LIPTON, INC.

Defendant Thomas J. Lipton, Inc. ("Lipton") hereby answers the Complaint of Plaintiff R.C. Bigelow, Inc. ("Bigelow").

* * *

THIRD DEFENSE

The claims set forth in the Complaint are moot.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

R.C. BIGELOW, INC.,

Plaintiff,

v.s.

UNILEVER N.V., THOMAS J. LIPTON, INC., CELESTIAL SEASONINGS, INC. and KRAFT, INC.,

Defendants.

CIV. ACTION NO.

B-88-299 (JAC)

ANSWER OF KRAFT, INC.

Defendant Kraft, Inc. ("Kraft") answers the Complaint of R.C. Bigelow, Inc. as follows:

* * *

Second Defense

There is no controversy between plaintiff and defendants.

Third Defense

This action is moot.

(3)

No. 88-1948

FILED
AUG 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS J. LIPTON, INC., and KRAFT, INC.,
Petitioners,

v.

R.C. BIGELOW, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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* Counsel of Record

August 16, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1948

THOMAS J. LIPTON, INC., and KRAFT, INC.,
Petitioners,

v.

R.C. BIGELOW, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioners Thomas J. Lipton, Inc. ("Lipton") and Kraft, Inc. ("Kraft") respectfully submit this reply brief in support of their petition for a writ of certiorari ("Petition").

1. *Atlantic Richfield.* On June 5, 1989, the day the Petition was filed, the Court granted certiorari in *U.S.A. Petroleum Co.* v. *Atlantic Richfield Company*, 859 F.2d 687 (9th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3789 (U.S. June 6, 1989) (No. 88-1668).

Atlantic Richfield presents the question whether, under Section 4 of the Clayton Act, 15 U.S.C. § 15, antitrust injury to a competitor may be presumed solely from evidence relating to the alleged substantive antitrust viola-

tion. Our Petition presents precisely the same question under Section 16 of the Clayton Act, 15 U.S.C. § 26.[1]

Section 4 and Section 16 are parallel provisions. Section 4 affords standing to seek treble damages to a "person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." Section 16 affords standing to seek injunctive relief to a "person . . . threatened [with] loss or damage by a violation of the antitrust laws . . ." In *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986), the Court recognized that "Sections 4 and 16 are thus best understood as providing complementary remedies for a single set of injuries."

The Second Circuit here, and the Ninth Circuit in *Atlantic Richfield*, ignored the threshold antitrust injury requirement and held that proof relating to the substantive antitrust claim permits a presumption of antitrust injury. Such holdings are consistent with the dissent in *Cargill*, but wholly inconsistent with the opinion for the Court.[2]

---

[1] The procedural posture of this case and of *Atlantic Richfield* are also identical: in both cases, the appeal court reversed summary judgment granted by the district court to defendants because plaintiff lacked antitrust standing. It is well settled that review by this Court is appropriate at this point and need not await final judgment. *E.g., Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947).

[2] The Second Circuit roved farther afield than the Ninth Circuit. While the Ninth Circuit presumed antitrust injury in a vertical price fixing case, it conceded that in a merger case, *Cargill* requires proof of injury from predatory or otherwise illegal pricing. 859 F.2d at 694. The Second Circuit waived such proof of antitrust injury in a merger case. The Second Circuit's presumption—that a company with a high market share will engage in predatory practices—lacks any support in antitrust case law.

Predictably, the postmerger market share sufficient for a presumption of antitrust injury in the Second Circuit is falling rapidly. In *Remington Products, Inc.* v. *North American Phillips Corp.*, Civ.

In contrast, the Fifth and Seventh Circuits, in *Phototron Corp.* v. *Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988) and *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989), have adhered to the Court's opinion in *Cargill* and have required a complaining competitor to prove as a threshold matter, and independent of the substantive antitrust violation, that the competitor has suffered or will suffer antitrust injury, as required by Sections 4 and 16.

We urge the Court to grant the Petition, consolidate this case for decision with *Atlantic Richfield*, and resolve this intercircuit conflict under these parallel provisions of the antitrust laws. Alternatively, we urge the Court to hold the Petition in abeyance pending the Court's decision in *Atlantic Richfield*.

2. *The Justiciable Case or Controversy.* Having successfully argued to the Second Circuit that this case is not moot, Respondent R. C. Bigelow, Inc. ("Bigelow") now argues here, on the same operative facts, that certiorari should be denied because the case may be found to be moot by the District Court.[3] Additionally, while claiming mootness here, Bigelow simultaneously claims below that, having "substantially prevailed" in the Second Circuit, it will seek on remand to impose injunctive obligations and substantive legal fees upon Petitioners. See Petition, n.18 at p. 17.

No. B-82-56 (D. Conn. July 10, 1989) (LEXIS, Genfed library, Dist. file), at p. 4, a postmerger market share of 55% was held sufficient to do away with proof of likely antitrust injury, and a postmerger market share of 48.8% was stated to be similarly sufficient. The *Remington* court initially granted summary judgment to the defendant based on *Cargill* but reversed itself following the decision of the Second Circuit in this case.

[3] Prior to the decision of the Second Circuit, Lipton and Kraft advised the Second Circuit that the proposed sale of Celestial Seasonings, Inc. ("Celestial") by Kraft to Lipton had been abandoned; that Kraft had sold Celestial to another corporation; and that Lipton had no present intention of acquiring Celestial from its new owner. The post-remand discovery on mootness, mentioned in the Petition at p. 17 n.17, has elicited no new operative facts.

Petitioners oppose Bigelow's claims for injunctive relief and legal fees.

This controversy, then, remains very much alive.

The Second Circuit decision, in which Bigelow presses its claims for injunctive relief and legal fees, is now the law of the case. It will remain so unless reversed or vacated by the Court. If, as we contend, the Second Circuit's decision is wrong, and if Bigelow has failed to establish antitrust standing as required by *Cargill*, then Bigelow will have no basis for seeking injunctive relief and legal fees. Petitioners therefore have a "legally cognizable interest" in seeking review of the Second Circuit's antitrust injury holding, upon which Bigelow's prayers for injunctive and other relief are based. *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). The practical consequences of denying review remain both real and considerable to Petitioners, and the case remains justiciable. *Local No. 82* v. *Crowley*, 467 U.S. 526, 536, n.11 (1984); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *but see Friends of Keeseville, Inc.* v. *FERC*, 859 F.2d 230, 233 n.7 (D.C. Cir. 1988).

The Second Circuit below found "a significant public interest involved in having the legality of practices challenged in this case finally decided, *see United States* v. *W.T. Grant Co.*, 345 U.S. 629, at 632 [1953]." 867 F.2d 102 at 107, Petition, p. 10a. For the reasons stated in the Petition, there is far more significant public interest involved in having this Court review the Second Circuit decision, resolve the conflict among the circuits, and reaffirm the *Cargill* rule that competitors must show Section 16 antitrust injury before they may challenge a merger under Section 7 of the Clayton Act.

We urge the Court to grant this Petition and address this Section 16 antitrust injury question along with the substantially identical Section 4 antitrust injury question in *Atlantic Richfield*. Alternatively, because the Second

Circuit decision is flatly contrary to Cargill, that decision should be summarily vacated and the District Court's grant of summary judgment to Petitioners reinstated.

Respectfully submitted,

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